THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

Case No. 2020-001445

Randy and Cheryl Gilchrist

Appellants

v.

Duke Energy Carolinas, LLC

Respondent

RECORD ON APPEAL

Randy and Cheryl Gilchrist
3010 Lake Keowee Lane
Seneca, SC 29672
Phone: 864.903.0375
Appearing Pro Per/Appellants

Parties of Record:

Honorable Jocelyn C. Boyd, Chief Clerk/Executive Director
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Attorneys for Respondent, Duke Energy Carolinas, LLC:

Samuel J. Wellborn, Esq.
Robinson Gray Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211
Phone: 803.231.7829

INDEX

Correspondence:

INCLUDED IN ERROR
DOC. Removed from Record

Transcripts:

Authorities:

Public Service Commission of South Carolina
101 Executive Center Dr., Suite 100
Columbia, SC 29210

Phone: 803-896-5100
Fax: 803-896-5199
www.psc.sc.gov

Individual Complaint Form Instructions and Procedure

Please contact the Office of Regulatory Staff (ORS) at 803-737-5230 (Columbia, SC) or 800-922-1531 (toll free) to attempt to informally resolve this issue prior to filing an official complaint with the Commission.

A. To file an official complaint:

1. Complete the Complaint Form found on the Commission's website at www.psc.sc.gov.
   a.) The form may be completed and e-mailed to contact@psc.sc.gov.
   b.) Alternatively, a blank copy of the form may be printed, filled out, and then mailed or faxed to the Commission.

2. Individuals do not need to have legal representation to represent themselves before the Commission, but a corporation, partnership, limited liability company, or group of people or association must be represented by legal counsel. Neither the Commission nor the ORS can provide legal advice.

3. If additional documentation is necessary to supplement your complaint, attach it to the form. The Public Service Commission of South Carolina has adopted the same standards regarding protection of personal identifying information as are in place in the various state courts (except Family and Probate Courts). These are set out in Rule 41.2(a) of the South Carolina Rules of Civil Procedure and are listed below:
   a) Redaction. A person filing a document in paper or electronic format shall not include, or will redact where inclusion is necessary, the following personal identifying information.
   b) Social Security Numbers, Taxpayer Identification Numbers, Driver's License Numbers, Passport Numbers or Any Other Personal Identifying Numbers. If it is necessary to include personal identifying numbers in a document, the parties should utilize some other identifier. Parties shall not include any portion of a social security number in a filing.
   c) Names of Minor Children. If a minor is the victim of a sexual assault or the victim in an abuse or neglect case, the minor's name must be completely redacted and a term such as "victim" or "child" should be used. In all other cases, the minor's first name and first initial of the last name (i.e., John S.), or only the minor's initials (i.e., J.S.) should be used.
   d) Financial Account Numbers, Including Any Type of Bank Account Numbers, Personal Identification Number (PIN) Code, or Passwords. If financial account numbers are relevant, only the last four digits of these numbers should be used.
   e) Home Addresses of Minors, Sexual Assault and Abuse and Neglect Victims, and Non-Parties. If a home address of a minor, sexual assault victim, or non-party must be included, only the city and state should be used.
   f) Date of Birth. If a date of birth must be included, only the year of birth should be included.

Individuals who file documents with the Public Service Commission are hereby notified that their filings will be made available to the public on the Commission's searchable Docket Management System. The Public Service Commission assumes no responsibility for redacting personal identifying information from any filings. It is solely the responsibility of the filer to ensure that no personal identifying information is made public by inclusion in his or her filings.

I have read and understand the Public Service Commission's policy pertaining to privacy protection for filings.

Signature of Filer: _____

4. The Commission hears matters involving regulated utilities, but cannot award any monetary damages other than refunds for overpayments.

5. Complete the section of the form regarding publishing the contents of the complaint on the Commission's website (dms.sc.gov).

6. Complete the Verification section of the form. The form must be dated and signed before it will be processed. The information presented in the complaint form will serve as your pre-filed testimony for your case. It is important that your Statement of Facts be accurate and concise.

B. Your complaint will be processed by the Clerk's Office and assigned a docket number.

C. A Hearing Examiner will be appointed to your case.

D. You will receive a letter notifying you of the date of your hearing before the Commission.

E. After the Docketing Department has assigned a docket number, you can review your case online by accessing the Commission's **Docket Management System (DMS)** (http://dms.psc.sc.gov/dockets). To view your case, enter the docket number assigned to your case. The docket number is in the format yyyy-nnn-l (e.g. 2009-401-E) and will be located on any correspondence to you from the Commission.

F. After the docket is established, any mailings or requests to the Commission must be copied to all parties of record listed in the docket.

G. **You must continue to make timely payments on any undisputed amounts on your account while your case is pending before the Commission or your service may be disconnected.**

Complete Form, Print, Sign and Mail to:
Public Service Commission of South Carolina
101 Executive Center Dr., Suite 100
Columbia, SC 29210

Phone: 803-896-5100
Fax: 803-896-5199
www.psc.sc.gov
Text PSCAGENDAS to 39411
To receive an alert when Meeting Agendas are released

Individual Complaint Form

Date:* 06/01/2020

Complainant or Legal Representative Information: * Required Fields

Name:* Randy and Cheryl Gilchrist

Firm (if applicable):

Mailing Address:* 3010 Lake Keowee Lane

City, State Zip:* Seneca SC 29672 Phone:* 864-903-0375

E-mail

Name of Utility Involved in Complaint:* Duke Energy

Type of Complaint: (check appropriate box below)*

- ☐ Billing Error/Adjustments
- ☐ Deposits and Credit Establishment
- ☐ Wrong Rate
- ☐ Refusal to Connect Service
- ☐ Disconnection of Service
- ☐ Payment Arrangements
- ☐ Water Quality
- ☐ Line Extension Issue
- ☐ Service Issue
- ☒ Meter Issue
- ☐ Other (be specific)

Have you contacted the Office of Regulatory Staff (ORS)?* ☒ Yes ☐ No Name of ORS Contact: Brad Kirby

Concise Statement of Facts/Complaint:* (This section must be completed. Attach additional information to this page if necessary.)

Since July 3, 2017, Duke Energy has repeatedly attempted to coerce us into accepting a smart meter. We have consistently objected to - and denied consent for - this installation. We believe the meters represent a health hazard, and violate our right to privacy, a right protected by the U.S. Constitution and the State of South Carolina Constitution. On October 10, 2019, Duke Energy did trespass and install a smart meter, which was over our objections and without our consent.

Relief Requested:* (This section must be completed. Attach additional information to this page if necessary.)

We want the smart meter removed and replaced with the mechanical, analog meter we had when service was initiated. We do not want to be charged a fee for opting out, as we should not be charged a fee for the exercise of common law rights.

I GIVE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA PERMISSION TO PUBLISH THIS COMPLAINT AND ITS CONTENTS ON THE COMMISSION'S WEBSITE (dms.psc.sc.gov), AND I UNDERSTAND SUCH INFORMATION MAY BE SUBJECT TO PUBLIC SCRUTINY OR FURTHER RELEASE. ☐ ☐

Randy & Cheryl Gilchrist
Complainant's Signature* (MUST BE SIGNED, DO NOT PRINT)

VERIFICATION

STATE OF SOUTH CAROLINA)
COUNTY OF Oconee)
)

I, Randy & Cheryl Gilchrist (Complainant's Name*) verify that I have read my complaint filed on 6/1/2020 (Date*) and know the contents thereof, and that said contents are true.

Randy & Cheryl Gilchrist
Complainant's Signature* (MUST BE SIGNED, DO NOT PRINT)

Internal Use Only	
Processed By	Date
H.E.	

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NOS. 2005-385-E and 2005-386-E - ORDER NO. 2007-618

AUGUST 30, 2007

IN RE:	Docket No. 2005-385-E – Petition of the Office of Regulatory Staff to Establish Dockets to Consider Implementing the Requirements of Section 1251 (Net Metering and Additional Standards) of the Energy Policy Act of 2005.	) ORDER ON CONSIDERATION OF THE APPROPRIATE STANDARDS TO BE USED FOR NET METERING AND SMART METERING IN SOUTH CAROLINA
	and	)
	Docket No. 2005-386-E – Petition of the Office of Regulatory Staff to Establish Dockets to Consider Implementing the Requirements of Section 1252 (Smart Metering) of the Energy Policy Act of 2005.	)

These matters come before the Public Service Commission of South Carolina ("the Commission") on the Petitions of the Office of Regulatory Staff ("ORS") to Establish Dockets to Consider Implementing the Requirements of Section 1251 (Net Metering and Additional Standards) and to Consider Implementing the Requirements of Section 1252 (Smart Metering) of the Energy Policy Act of 2005.

On May 15, 2007, this Commission held a hearing at which parties presented testimony and exhibits dealing with implementing in South Carolina the net metering and smart metering provisions of the Energy Policy Act of 2005. The regulated investor owned utilities in South Carolina to which the net metering and smart metering

provisions are applicable, and the Office of Regulatory Staff, ("the Joint Parties") presented a joint proposal for the disposition of these two matters.

With respect to net metering, the utilities and ORS proposed implementing the same program that has been implemented in North Carolina. In short, as proposed by the Joint Parties, a customer who opts to be net metered would be subject, on a monthly basis, to: a basic facilities charge at the tariff rate; a demand charge at the tariff rate for the customer's highest demand in that month; on-peak customer generation would offset the customer's on-peak consumption, with the net on-peak consumption billed at the on-peak tariff rate; off-peak customer generation would offset the customer's off-peak consumption, with the net off-peak consumption billed at the off-peak tariff rate; excess on-peak customer generation would be used to offset customer's off-peak consumption, but not vice versa, recognizing the higher cost of on-peak generation; in no case would the charge to the customer be less than zero; and customer credits would carry over to the succeeding month for one year. After one year, any remaining credits would be zeroed out; and, excess Renewable Energy Credits (Green Tags) would be granted to the utility. Residential customer generation would be limited to a maximum of 20 kW, and non-residential customer generation would be limited to a maximum of 100 kW. Participation would be limited to 0.2% of the South Carolina jurisdictional peak load for the prior year. According to the Joint Parties, the joint proposal is designed to maintain system reliability while allowing utilities and consumers to test net metering. It is also designed to preclude subsidization of net metering customers by those who chose not to net meter.

After close analysis of the proposed program, the Commission adopts the joint proposal as offered with two exceptions. Residential and small commercial customers currently have a choice to be on a flat rate tariff or a time-of-use tariff with a demand component. This Commission is interested in exploring the feasibility of offering a similar choice between a "flat rate" or a "time-of-use with demand component" tariff to customers who would like to take advantage of net metering. Therefore, within 90 days of the filing of this Order, the utilities shall provide a proposed tariff that would allow such a choice for customers who choose to net meter. Specifically, the tariff should be designed to allow residential and small commercial customers to pay the utility's existing flat kWh rate for any power purchased from the utility, while receiving a credit for any excess generation provided to the utility on a peak/off-peak or real time pricing basis. This tariff should be designed to eliminate, as much as possible, any cross-subsidization of customers. If, after investigation, any utility believes that such a tariff is not feasible, they should explain the reasons for this conclusion, within 60 days of the filing of this Order, in lieu of proposing the requested tariff. Secondly, the Commission is aware that Renewable Energy Credits are not currently being traded, and thus have no applicability at this time. Therefore, we will address ownership of Renewable Energy Credits when a viable market exists, and we will look to the parties to raise the issue at that time. All other aspects of the utilities' proposed net metering program would remain the same.

With respect to Smart Metering, the utilities and ORS point out that our regulated utilities all have offered time-based rate schedules for some time and that a number of large load customers take advantage of programs which provide real-time load data to

facilitate the ability of customers to manage their power requirements. Their proposal concludes that this offering meets the pertinent EPAct 2005 requirements. In general, the Commission supports this position, and so finds. Therefore, the Commission accepts the joint position of the regulated utilities and ORS that adoption of the federal standards is not necessary with regard to smart metering.

However, we note the conspicuous lack of focus on residential and commercial customers with respect to smart metering. One reason for the low usage of smart meters by residential and commercial customers may be a lack of knowledge on the part of those customers with respect to the availability and capability of smart meters. We therefore order the utilities to continue to make smart meters available to all customers, and also order the utilities to propose, within 180 days from the date of this Order, a communications plan to inform all customers of the availability and capability of smart meters, how they may use those capabilities to better manage their power requirements, and any additional costs and available payment arrangements for those costs.

An additional issue that arose from testimony at the smart metering hearing involved internal smart metering installed by some Wal-Mart stores. Wal-Mart's witness requested that it not have to pay for a utility-installed smart meter if Wal-Mart has already installed a smart meter which meets or exceeds utility or Commission standards at a store. Rather than ruling on this issue based on the limited record currently presented in this docket, this Commission encourages Wal-Mart and the utility to try to resolve all issues concerning the installation of and payment for smart meters through negotiation.

If negotiations are unsuccessful, a party can file a formal complaint with this Commission.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

G. O'Neal Hamilton, Chairman

ATTEST:

C. Robert Moseley, Vice Chairman

(SEAL)

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2013-119-S - ORDER NO. 2016-34

JANUARY 8, 2016

IN RE: Robert B. Farmer - RBF Enterprises, LLC d/b/a McDonald's, Complainant/Petitioner v. Palmetto Wastewater Reclamation, LLC d/b/a Alpine Utilities, Defendant/Respondent	))))	ORDER DENYING PETITION FOR REHEARING AND RECONSIDERATION

Pursuant to S.C. Code Ann. § 58-5-330, this matter comes before the Public Service Commission of South Carolina ("Commission") on a Petition for Rehearing and Reconsideration by RBF Enterprises, LLC d/b/a McDonald's ("RBF" or "Complainant"). RBF's Petition for Rehearing and Reconsideration was filed after Order No. 2014-964 (December 2, 2014) dismissed its Complaint against Palmetto Wastewater Reclamation, LLC d/b/a Alpine Utilities ("PWR"). The Complaint stemmed from a rate increase the Commission approved by Order No. 2013-3(A) (January 11, 2013) in Docket No. 2012-94-S.[1]

Summary of the Complaint:

RBF filed its Complaint in the present Docket based on the amount of its bill following a rate increase granted to PWR in Docket No. 2012-94-S. RBF was not a party of record in that Docket. RBF's Complaint alleged a rate increase of 1,000% and claimed that the annual sewer bill for the company would rise by over $42,915.72 in a

[1] PWR has had a subsequent rate increase approved in Docket No. 2014-69-S .

twelve month period, RBF argued that this increase occurred in spite of the fact that it had a "car count" below that assumed for purposes of rate making in that docket and had generally low water consumption due to practices like using paper products to reduce the need for water to clean dishes and silverware. The relief requested by the Complaint was for the "PSC [to] review the Docket No. 2012-94-S and address the formula used to calculate the bill in light of the dramatic and outrageous increase of 1000%." In a letter attached to the Complaint, RBF sought a refund with interest.

History and Facts:

On March 27, 2013, in Docket No. 2012-94-S, the Commission asked the Office of Regulatory Staff to investigate the rates paid by PWR's commercial customers because of concern over the impact of the rate increase.[2] On April 3, 2013, RBF filed its Complaint against PWR regarding the rates approved in that Docket. Since the investigation could have affected the Complaint, the appointed Hearing Examiner issued a Directive on April 10, 2013, that held the present case, Docket No. 2013-119-S, in abeyance. The Hearing Examiner also informed the Complainant that attorney representation was required by 10 S.C. Code Ann. Regs. 103-805(B) for the matter to proceed.

On the day that the Hearing Examiner Directive was issued, D. Reece Williams, III, Esquire, filed a Notice of Appearance of Counsel for the Complainant. Notably, sometime in June 2013, RBF ceased operating the McDonalds at issue in this docket, and

[2] *See* March 27, 2013, Commission Directive for Rates Investigation and Order No. 2013-193 (May 3, 2013) (requesting ORS investigate PWR's commercial rates).

the premises have been occupied since July of 2013 by another entity which is currently PWR's customer. Therefore, as of that time, RBF's requested relief regarding future charges became moot.

On June 17, 2013, ORS filed the results of its investigation with the Commission, which found that the rate methodology approved in Docket No. 2012-94-S was a reasonable means of designing commercial customer rates.[3] Further, the ORS investigation did not conclude that PWR was charging any commercial customer at a rate unapproved by the Commission. On June 30, 2014, a Motion to Dismiss the RBF Complaint was filed by PWR, followed by RBF's Return to Motion to Dismiss on July 10, 2014, and then PWR's Reply to Response to Motion to Dismiss on July 17, 2014. On July 30, 2014, the Commission issued Order No. 2014-656, holding the Motion to Dismiss in abeyance, encouraging the parties to resolve the matter, and stating that it would take up the Motion to Dismiss if the matter was not resolved.

During the time that the Motion to Dismiss was held in abeyance, a separate docket with similar facts to Docket No. 2012-94-S was under review at the South Carolina Supreme Court.[4] That case involved an appeal from Docket No. 2013-42-S, in which intervenors J-Ray, Inc. and Sensor Enterprises, Inc. ("Appellants") objected to a rate increase granted by Commission Order No. 2013-660 (September 17, 2013).[5] The

[3] ORS Commercial Rates Study.

[4] Appellate Case No. 2013-002492 (Appeal held in abeyance by the Court and remanded pending the Commission's approval of a settlement agreement).

[5] Brief of Petitioner - Appellant at 5-8, Sensor Enterprises, Inc. and J-Ray, Inc. v. Palmetto Utilities Inc. and South Carolina Office of Regulatory Staff, No. 2013-002492 (S.C. March 21, 2014) (arguing "The

Appellants operate McDonald's restaurants in the service territory of Palmetto Utilities, Inc.[6] In that appeal, Appellants challenged the same rate methodology that the Commission approved to calculate PWR's rates in the present case. A ruling from the Court impacting the validity of that methodology could have directly impacted RBF's Complaint, since the relief sought by the Complaint was to review and address the same formula used to calculate its bill.

However, prior to a substantive ruling from the Supreme Court, the parties moved that the case be remanded to the Commission for consideration of a settlement proposal entered into by all parties. On October 2, 2014, the Court remanded the appeal for the Commission to consider the proposed settlement agreement, and as a result the Court did not make a substantive ruling on the appropriateness of the rate methodology.[7] Thereafter, in the present docket, on November 12, 2014, the Commission granted PWR's Motion, dismissing RBF's Complaint for failing to allege any fact that would entitle it to relief. On December 12, 2014, RBF filed a Petition for Rehearing and Reconsideration. The details of the Motion to Dismiss and the Petition for Rehearing and Reconsideration are discussed more fully in the next two sections.

overarching policy question underlying this appeal is whether it was appropriate for the PSC to approve PUI's Application where it premised commercial wastewater rates upon DHEC Unit Contributory Guidelines.").

[6] Both Palmetto Utilities, Inc. and PWR are subsidiaries of Ni America Operating, LLC. These public wastewater utilities are subject to the Commission's jurisdiction by the authority of S.C. Code Ann. § 58-5-210.

[7] The Commission approved the Settlement Agreement by Order No. 2015-153 (March 3, 2015).

Motion to Dismiss:

PWR's Motion to Dismiss, with reference to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, asserted that the Complaint failed to state facts sufficient to constitute a claim upon which relief may be granted under S.C. Code Ann. § 58-5-270. It further stated that the relief sought is prohibited by law because it constitutes retroactive ratemaking. PWR filed this motion with the request that it be considered without oral argument.

S.C. Code Ann. § 58-5-270 requires that a complaint set forth "any act or thing done, or omitted to be done" with respect to matters within the Commission's jurisdiction. In its motion, PWR argued RBF failed to meet this standard, since the Complaint's sole allegation was an increase to its wastewater bill as authorized by Order No. 2013-3(A). The motion further argued that RBF did not dispute the amount of the bill, but rather the rate approved by the Commission, which PWR claimed is not a basis for relief.

In addition, PWR contended that the relief sought in the Complaint could not be granted because it is unlawful for the Commission to issue refunds under a validly approved rate. The principle of retroactive ratemaking, as discussed in *SCE&G Co. v PSC*, 275 S.C. 487, 491, 272 S.E.2d 793, 795 (1980), holds that the Commission has no authority to require a refund after a utility has been allowed to collect under a legal rate. Therefore, PWR argued that the Complaint was deficient on its face and should be dismissed.

Despite the fact that a letter attached to RBF's Complaint stated it expected "a refund and interest once this situation has been cleared up," RBF responded to the Motion to Dismiss by arguing that "at the time the Complaint was filed, it was not requesting that the Public Service Commission (PSC) change its rate retroactively so as to provide it with a refund. In fact, RBF Enterprises was requesting that its sewer rate be changed prospectively due to the significant increase that it was facing."[8] This contradiction is compounded by the fact that – although it filed its complaint in April – by sometime in June 2013 RBF had already ceased operating the site in question and was no longer subject to PWR's rates, making consideration of prospective relief moot. The Return to Motion to Dismiss concluded with a request that a hearing be scheduled on RBF's request for relief.

PWR's Reply to Response to Motion to Dismiss pointed out that RBF's Return to Motion to Dismiss addressed whether the Complaint sought relief that constitutes retroactive ratemaking, but failed to address whether the Complaint stated facts sufficient to constitute a claim upon which relief may be granted under S.C. Code Ann. § 58-5-270. PWR's Reply renewed the contention that the Complaint fails to allege facts upon which relief may be granted. Again referring to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, PWR further supported this position, arguing:

> The only fact alleged in the Complaint as to PWR is that it increased the amount it billed RBF for service. According to the Complaint, this fact warranted a "review" by the Commission "of the formula as prescribed in Docket No. 2012-94-S" and entitled RBF "to expect a refund and interest once this situation has been cleared up." However, the Company was

[8] Return to Motion to Dismiss at 1.

authorized to increase the amount it charged RBF by Order No. 2013-3(A) and, therefore, no factual basis exists for the relief sought by the Complainant – which is a reduction in RBF's Bill. [9]

With this reasoning, among other arguments, PWR continued to maintain that it was entitled to have the Complaint dismissed.

With notice to the public, the Motion to Dismiss was scheduled for action on the Commission's agenda to be determined as an item of business at the regularly scheduled formal business meeting of November 12, 2014. At the meeting, Counsel for RBF interrupted the Commission's actions on its business agenda by attempting to argue the merits of RBF's Complaint, regardless of the fact that neither PWR nor its counsel was present and regardless of the fact that this Commission business meeting was not a hearing. During this disruption, counsel stated that the parties had presented briefs on the Motion to Dismiss, but he then proceeded to argue that RBF was denied an opportunity to be heard. He further attempted to present a witness to testify.

This testimony was not allowed, and the Commission took action on its business agenda. It voted unanimously to dismiss the Complaint, holding that RBF failed to allege any fact demonstrating that PWR had done anything prohibited by Commission regulations, or that PWR omitted doing anything required by Commission regulations which would entitle RBF to relief. This decision was memorialized by Order No. 2014-964 (December 2, 2014). Thereafter, RBF filed a Petition for Rehearing and Reconsideration.

[9] Reply to Response to Motion to Dismiss at 3.

Petition for Rehearing and Reconsideration:

The Petition for Rehearing and Reconsideration argues the Commission improperly dismissed RBF's Complaint for three main reasons. The first two reasons concern allegations that the November 12, 2014 Utilities Agenda was deficient, and RBF was denied an opportunity to be heard when counsel was not allowed to argue at the business meeting for that agenda. Regarding these first two reasons, the petition specifically asserts:

> 7. [The Commission's November 12, 2014 Utilities Agenda] purports on its face only to provide a basis for a discussion of the [Motion to Dismiss] with the Commission.
>
> 8. Counsel for RBF Enterprises, LLC attended the meeting but was not able to present an argument to the Commission regarding the Complaint and Motion to Dismiss.
>
> 9. Following the meeting, the Commission issued the Order dated December 2, 2014, dismissing RBF Enterprises, LLC's Complaint.
>
> 10. Thus, the Commission dismissed RBF Enterprises, LLC's Complaint without any opportunity for the Complainant to be heard on the matter.[10]

With respect to RBF's allegations concerning the sufficiency of the Commission's November 12, 2014 Utilities Agenda and failure to be heard, the agenda (which had been posted and made available to the public the previous week) introduced the items for consideration that day with the following bolded, underlined statement:

[10] Petition for Rehearing and Reconsideration at 2.

"COMMISSION ACTION ON THE FOLLOWING ITEMS:". Listed beneath this statement, Item No. 8 on the agenda stated:

> DOCKET NO. 2013-119-S – Robert B. Farmer – RBF Enterprises, LLC d/b/a McDonald's, Complainant/Petitioner v. Palmetto Wastewater Reclamation, LLC d/b/a Alpine Utilities, Defendant/Respondent – Discuss with the Commission the Motion to Dismiss Filed on Behalf of Palmetto Wastewater Reclamation, LLC d/b/a Alpine Utilities.

When Commission Staff introduced this item at the Commission's business meeting, Counsel for RBF, in an apparent attempt to discuss the case, interrupted that meeting stating:

> ...We presented a brief, in writing, and there was a brief in opposition, and we've not had an opportunity to be heard. I got notice, of course, of this meeting today, and the lawyer for Palmetto is not present. We think this is a matter of considerable sensitivity, since Mr. Farmer's rate went up a thousand percent – 1000 percent –and in this business, there have been compromises reached that are very important...[11]

Although counsel was informed that this disruption was inappropriate, in its petition RBF argues that it was denied an opportunity to be heard because counsel was not allowed to present a witness and argue the merits of his case at the Commission business meeting.

Regarding its third reason, the petition maintains that the Commission erred because 10 S.C. Code Ann. Regs. 103-829(B) "provides no authority for the Commission to decide a motion without notice and without an opportunity for all parties of record to

[11] Transcript/Minutes of Commission Meeting on November 12, 2014 at 8.

present oral argument and response."[12] Regulation 103-829, which governs the filing and consideration of motions, provides:

> A. Motions, except those made during hearings, will be reduced to writing and filed with the Chief Clerk at least ten (10) days prior to the commencement of a hearing. Responses to such motions are due within ten days after service of said motions. Replies to responses to motions shall be filed with the Commission within five days of service of the response. These times may be modified by order of the Commission or its designee for good cause. Written motions to quash a subpoena will be made pursuant to R. 103–832.
>
> B. The Commission, in its discretion and upon due notice to all parties of record, may entertain oral argument and response on prefiled motions in advance of the scheduled hearing in the proceeding to which the motions pertain. Otherwise, such argument and response shall be made at the commencement of the hearing. The presiding officer may make a ruling upon such motion at the completion of oral argument, at the conclusion of the hearing, or in the written order making disposition of the subject matter of the proceeding.

RBF argues that this regulation gives discretion for the Commission to hear oral argument and response "on the Motion prior to or at the commencement of the hearing of the underlying proceeding."[13] RBF then contends that Regulation 103-829(B) provides "no authority for the Commission to decide a Motion without notice and without an opportunity for all parties of record to present oral argument and response."[14] Based on this reasoning, the Petition concludes that the Commission committed an error of law, was clearly erroneous, and was arbitrary or capricious.

[12] Petition for Rehearing and Reconsideration at 3.

[13] *Id.*

[14] *Id.*

Discussion:

We find the Complainant's assertions that it was denied an opportunity to be heard after counsel was prohibited from arguing at the Commission business meeting to be without merit. As RBF's counsel acknowledged in his statement during the meeting, both parties had filed briefs on this matter. Furthermore, S.C. Code Ann. § 58-3-90 requires that the Commission conduct business at scheduled formal meetings, and 10 S.C. Code Ann. Regs. 103-814 specifies that these business meetings are held "for the purposes of formulating decisions, composing orders, planning and coordinating the work of the Commission, and conferring with the Commission staff." Notably, these public meetings are not evidentiary hearings as RBF seems to claim.

The notice of the Commission's agenda for business meetings clearly indicates that the items listed are for Commission action. The statement preceding those numbered items on the agenda plainly communicates that it is introducing items for action by the Commission: "**COMMISSION ACTION ON THE FOLLOWING ITEMS:**". The term "discuss" that announces each specific agenda item, for instance "Discuss with the Commission the Motion to Dismiss Filed on Behalf of Palmetto Wastewater Reclamation, LLC d/b/a Alpine Utilities," is – and has been for over a decade – a way for staff to administratively present items of business to the Commissioners so that they may formulate decisions. It is an untenable argument to assert that RBF's Complaint was dismissed without an opportunity for the Complainant to be heard because RBF was unable to make a presentation of a witness at a statutorily defined formal business meeting.

RBF's argument concerning the Commission's discretion to hold oral argument regarding motions is equally without merit. When RBF states that 10 S.C. Code Ann. Regs. 103-829(B) "provides no authority for the Commission to decide a motion without notice and without an opportunity for all parties of record to present oral argument and response," it seems to be arguing that 10 S.C. Code Ann. Regs. 103-829(B) requires the Commission to hold oral arguments on all prefiled motions, but that it is within the Commission's discretion to hold a separate hearing on those motions in advance of an already scheduled hearing. Under this line of reasoning, if no prior hearing is held, the Commission must hold oral argument on such motions at the start of the scheduled hearing. Based on this logic, RBF contends that it was denied an opportunity to be heard, since the Commission did not hold oral argument on the Motion to Dismiss as RBF maintains was required by the Regulation.

This rationale fails for several reasons. Foremost, interpreting the language of Regulation 103-829(B) to require a hearing on all motions, as RBF argues, would cause the regulation to be in direct conflict with the Commission's statutory discretion to hear complaints under S.C. Code Ann. § 58-5-270. This statute, found in the Commission's provisions regarding the rates and service of water and wastewater public utilities, governs applications, consumer complaints, and hearings. Under Section 58-5-270, "the Commission has jurisdiction to hear complaints regarding the reasonableness of any rates or charges that affect the general body of ratepayers; but the Commission may at its discretion refuse to entertain a petition as to the reasonableness of any rates or

charges..."[15] Since the Commission had discretion to refuse to entertain the Complaint in this case, it follows that it also had discretion to refuse to entertain oral argument concerning a motion filed in the same docket. In other words, the Commission exercised its statutory discretion to refuse to entertain a complaint by dismissing RBF's Complaint based on the filings in this matter. Consequently, the claim that the Commission erred as a matter of law by depriving Complainant of an opportunity for oral argument is belied by the Commission's statutory discretion to wholly decline to hear the merits of a case pursuant to Section 58-5-270.

Nevertheless, we do not interpret Regulation 103-829(B) to be in conflict with Section 58-5-270. To conclude otherwise would invalidate the regulation, and that analysis is unnecessary.[16] Under the principle that a rule may only implement the law,[17] we interpret the Commission's statutory discretion discussed above to be consistent with the meaning of Regulation 103-829(B).

As previously stated, Regulation 103-829-B provides:

> The Commission, **in its discretion** and upon due notice to all parties of record, **may entertain oral argument** and response on prefiled motions in advance of the scheduled hearing in the proceeding to which the motions pertain. Otherwise, **such argument** and response shall be made at the

[15] Although not relevant to this Docket, certain conditions apply that remove the Commission's discretion to refuse to entertain a complaint under Section 58-5-270, and mandate Commission consideration of it, if it concerns the general body of subscribers. These conditions include being "signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission or other legislative body of the city or county or city or town affected by the subject matter of such complaint or by not less than twenty-five consumers of the public utility named in the complaint."

[16] *Banks v. Batesburg Hauling Co.*, 202 S.C. 273, 24 S.E.2d 496, 499 (1943).

[17] *Id.*

> commencement of the hearing. The presiding officer may make a ruling upon such motion at the completion of oral argument, at the conclusion of the hearing, or in the written order making disposition of the subject matter of the proceeding. (Emphasis added).

The "such argument" referenced in the regulation is that argument which the Commission "in its discretion" may entertain. It is not a mandatory requirement that oral argument be held for every motion, which would also violate the tenant of judicial economy and ignore the common practice of courts deciding matters based on the filings. The Commission has consistently applied Regulation 103-829(B) in this way since its promulgation in 2007, entertaining oral argument, or not, in its discretion. This interpretation harmonizes Regulation 829(B) with Section 58-5-270.

Moreover, although RBF emphasizes the provisions of Regulation 103-829(B), these provisions must be read in concert with those found in Regulation 103-829(A), which allow written Motions, Responses to Motions, and Replies to Responses to Motions. In this case, the Commission received a Motion to Dismiss, a Return to Motion to Dismiss, a Reply to Response to Motion to Dismiss, and a Petition for Rehearing and Reconsideration. Accordingly, it is evident by these filings that RBF had a full opportunity to be heard through written filings, and no oral hearing on the Motion to Dismiss was required, especially since the written filings clearly showed that the Complainant was not entitled to any relief.

For instance, although RBF's Return to Motion to Dismiss attempts to remake the Complaint as only seeking prospective relief,[18] this attempt is negated by the fact that the letter attached to the Complaint clearly states that a refund is expected.[19] However, *SCE&G Co. v PSC*, 275 S.C. 487, 491, 272 S.E.2d 793, 795 (1980) makes it clear that the Commission has no authority to issue a refund in this circumstance. According to *SCE&G*, the Commission simply does not have the power to award refunds in the nature of reparations for past lawful rates or charges, as is the case here after rates were validly approved in Docket No. 2012-94-S. Therefore, we are unable to grant the relief sought by Complainant as a matter of law. Further, it is impossible to grant prospective relief, even if we found in favor of RBF, because Complainant ceased to be a customer of PWR shortly after it filed the Complaint and is consequently no longer subject to its rates.

Last, in addition to the statutory discretion to entertain the merits of a complaint under Section 58-5-270, the Commission also maintains the discretion to waive regulations under the authority of 10 S.C. Code Ann. Regs. 103-803. According to this provision:

> In any case where compliance with any of these rules and regulations produces unusual hardship or difficulty, or where circumstances indicate that a waiver of one or more rules or regulations is otherwise appropriate, such rule or regulation may be waived by the Commission upon a finding by the Commission that such waiver is not contrary to the public interest.

Thus, even if the Commission's above-stated interpretation of Section 58-6-270 and Regulation 103-829(B) were unavailing, the Commission has the discretion to waive its

[18] Return to Motion to Dismiss at 1.

[19] As mentioned previously in this Order, the letter attached to RBF's Complaint states: "I will expect a refund and interest once this situation has been cleared up."

own regulations. Under this authority, the Commission's Directive on January 7, 2015 found that the provisions of Regulation 103-829(B) addressing oral argument were impliedly waived when granting PWR's Motion to Dismiss. The Directive then expressly waived those provisions, finding that this action was appropriate under the circumstances of this Docket and not contrary to the public interest when relief could not be granted.

Conclusion:

This matter was ripe for dismissal at the outset of its filing because it failed to allege any matter cognizable under S.C. Code Ann. § 58-5-270. However, dismissing the Complaint while similar matters outside of the Docket were pending may have precluded relief that could have been in RBF's favor. For example, the ORS investigation into PWR's commercial rates could have shown charges unauthorized by the Commission. In addition, the appeal of intervenors J-Ray, Inc. and Sensor Enterprises, Inc. from Docket No. 2013-42-S could have resulted in the South Carolina Supreme Court invalidating the rate methodology in Docket No. 2012-94-S, which would have caused the Commission to re-examine the formula used in calculating RBF's bill, as the Complainant requested. We held this matter open for those external events to conclude, and encouraged the parties to resolve their differences.

However, once it became clear that the rates and rate methodology would be supported by ORS, and the Supreme Court would not be ruling on the validity of the rate methodology, the Commission dismissed the Complaint. At that point, factors outside the Complaint Docket no longer had bearing on the requested relief, and based on the

pleadings and other materials in Docket No. 2013-119-S, we saw no reason for the Complaint to go forward.

Furthermore, although RBF had notice of the possible rate increase and an opportunity to intervene in Docket No. 2012-94-S and present facts prior to a decision, it did not intervene as a party in that Docket. Months after the Order was issued in Docket No. 2012-94-S, RBF filed a Complaint under the present docket attempting to introduce additional facts so the Commission could reconsider the formula used to calculate the company's bill. However, since RBF was not a party to the original docket, it was not entitled to request reconsideration in Docket No. 2012-94-S. Moreover, we find the additional facts introduced by the Complaint are immaterial to the decision reached in that Docket.

Likewise, we find that the facts asserted in the Complaint are insufficient to constitute a claim upon which relief may be granted. RBF's Complaint expects the retroactive relief of a refund with interest, but the Commission does not have the authority to retroactively reduce valid rates. Inconsistently, RBF's Return to Motion to Dismiss argues that it is only seeking prospective relief. However, RBF was no longer a customer of PWR in June of 2013, two months after the Complaint was filed on April 3, 2013, and it is impossible to grant prospective relief because RBF is no longer subject to PWR's rates.

As to the Petition for Reconsideration, we find the argument that RBF was denied an opportunity to be heard, by deciding the Motion to Dismiss on the pleadings and other materials, to be unpersuasive for the reasons described in this Order. RBF had a full

opportunity to be heard through its many filings, and no hearing on the Motion to Dismiss was required, especially in light of the fact that those written filings clearly showed that the Complainant was not entitled to any relief.

As a consequence, we reiterate our holding that that the Complaint fails to state facts sufficient to constitute a claim upon which relief may be granted under S.C. Code Ann. § 58-5-270. Further, prospective relief became moot, and the retrospective relief sought by the Complainant would require retroactively altering validly approved rates, which is clearly impermissible. *See SCE&G Co.* 275 S.C. at 491, 272 S.E.2d at 795 (1980).

IT IS THEREFORE ORDERED:

That the Motion for Rehearing and Reconsideration is denied.

This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:

Nikiya Hall, Chairman

ATTEST:

Swain E. Whitfield, Vice Chairman

(SEAL)

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2016-354-E - ORDER NO. 2016-791

NOVEMBER 17, 2016

IN RE: Duke Energy Carolinas, LLC's Request for Approval of AMI Opt-Out Rider	)	ORDER APPROVING AMI OPT-OUT RIDER (RIDER MRM)

This matter comes before the Public Service Commission of South Carolina ("Commission") on the Application of Duke Energy Carolinas, LLC ("DEC" or "Company") for approval of its proposed Rider MRM, Manually Read Meter Rider. Because approval of Rider MRM does not require a determination of the rate structure and rate of return of the Company and will not result in any rate increase, S.C. Code Ann. § 58-27-870(F) allows the Commission to approve the proposed changes without notice being given or a hearing being held.

DEC is deploying advanced metering infrastructure ("AMI"), which includes deployment of smart meters to its customers in South Carolina. Smart meters give customers more information on how they use energy and provide increased convenience for customers as service connections and disconnections can be performed remotely without the need for a technician to visit their home or business. DEC anticipates the ability to provide customers with increased choices for energy delivery, billing and program offerings such as the Pay As You Go pilot in South Carolina, along with enhanced services that are all enabled by smart meters.

Although the Company's smart metering hardware complies with all applicable safety and regulatory requirements, some customers nevertheless have concerns about smart meters and would prefer a manually read meter. In response to these limited customer concerns, DEC proposes to offer an option to the customer where energy usage would not be communicated via radio frequency and the meter would be manually read by a meter reader visiting the premises, provided that such a meter is available for use by the Company. Customers participating in Rider MRM would not be able to participate in any current or future offerings enabled by smart meters. The Company proposes to limit participation under this Rider to all residential customers and non-demand metered nonresidential customers on the Small General Service Schedule SGS.

There are costs to offer Rider MRM, and as proposed, subscribing customers would be required to pay those costs via a set-up fee associated with costs including but not limited to customer enrollment, information technology ("IT") enhancements, installation of a manually read meter, and assignment to a manual meter reading route. In addition, a subscribing customer would pay a monthly fee to offset the cost of manually reading the meter. Rider MRM outlines the costs to customers selecting this option. Up to this point, customers that objected to the installation of a smart meter have been temporarily bypassed during the deployment and continue to be served by meters that are read by computer from a vehicle, sometimes referred to as "drive-by" readings. As more smart meters are deployed, drive-by routes are being discontinued which necessitates the need for a long-term solution for those customers that object to the installation of a smart meter. Upon

implementation of Rider MRM, customers objecting to the installation of a smart meter will be provided with the option to receive a manually read meter.

Rider MRM would require significant IT changes to the customer billing system. DEC has informed the Commission that Rider MRM would be available to customers by November 15, 2017, following Commission approval. The Company needs approval of this option prior to making IT programming changes in order to make the November 15, 2017, time frame. In the interim, Commission approval of Rider MRM will allow the Company to implement those changes with certainty that this option can be provided to customers, and will allow the Company to respond to customers who have requested DEC provide an opt-out option in lieu of installing a smart meter.

The Office of Regulatory Staff has reviewed the proposed Rider MRM, and it has no objection to its implementation.

We have also reviewed the proposed Rider MRM and found it to be consistent with the public interest. We therefore approve Rider MRM. This Rider shall become effective no earlier than November 15, 2017, without prior approval from the Commission.

This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:

Swain E. Whitfield, Chairman

ATTEST:

Comer H. Randall, Vice Chairman

Action Item 9

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
COMMISSION DIRECTIVE

ADMINISTRATIVE MATTER	☐	DATE	**June 12, 2019**
MOTOR CARRIER MATTER	☐	DOCKET NO.	**2016-354-E/2018-262-E**
UTILITIES MATTER	☑	ORDER NO.	**2019-429**

THIS DIRECTIVE SHALL SERVE AS THE COMMISSION'S ORDER ON THIS ISSUE.

SUBJECT:
DOCKET NO. 2016-854-E - Duke Energy Carolinas, LLC's Request for Approval of AMI Opt-Out Rider;
-and-

DOCKET NO. 2018-262-E - Duke Energy Progress, LLC's Request for Approval of Revised Meter Related Optional Programs Rider MROP - Staff Presents for Commission Consideration Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Request for Approval of Revised Manually Read Meter Rider (MRM) and Revised Meter Related Option Programs Rider (MROP).

COMMISSION ACTION:
The Commission approved AMI ("Advanced Metering Infrastructure") meter opt-out riders for DEC in 2016 and DEP in 2018. The Companies are now suggesting revisions to the riders. The proposed revisions are based on Commissioner questions in recent rate case proceedings regarding the availability of a medical opt-out provision for South Carolina customers commensurate with that ordered by the North Carolina Utilities Commission.
The Companies propose to provide that option to eligible South Carolina customers, and to allow for payment options for the set-up fee for those who desire such option. I move that we grant the requests. The revised riders incorporate the following changes:
1. Upon request, the one-time Initial Set-up Fee may be paid in six equal installments included as a part of the Customer's first six monthly electric service bills following installation of the manually read meter.
2. The Initial Set-up Fee and Monthly Rate shall be waived and not apply for customers providing a notarized statement from a medical physician fully licensed by the South Carolina Board of Medical Examiners stating that the customer must avoid exposure to radio frequency emissions, to the extent possible, to protect their health. All such statements shall be retained in the Companies records on a secure and confidential basis. The Companies will provide the customer with a required medical release form, to identify general enrollment information, and a physician verification statement. At the physician's option, a comparable physician verification statement may be submitted. I also move that the Companies provide us with communication plans for making this change known to interested customers.

PRESIDING: Randall SESSION: Regular TIME: 12:30 p.m.

	MOTION	YES	NO	OTHER
BELSER	☐	☑	☐	
ERVIN	☐	☑	☐	
HAMILTON	☐	☑	☐	
HOWARD	☐	☑	☐	
RANDALL	☐	☑	☐	

WHITFIELD ☐ ☑ ☐

WILLIAMS ☑ ☑ ☐

(SEAL)

RECORDED BY: J. Schmieding

Action Item 14

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
COMMISSION DIRECTIVE

ADMINISTRATIVE MATTER	☐	DATE	**September 25, 2019**
MOTOR CARRIER MATTER	☐	DOCKET NO.	**2019-230-E**
UTILITIES MATTER	☑	ORDER NO.	**2019-686**

THIS DIRECTIVE SHALL SERVE AS THE COMMISSION'S ORDER ON THIS ISSUE.

SUBJECT:
DOCKET NO. 2019-230-E - Enrique McMillon, Jr., Complainant/Petitioner v. Duke Energy Carolinas, LLC, Defendant/Respondent - Staff Presents for Commission Consideration Duke Energy Carolinas, LLC's Motion to Dismiss Complaint.

COMMISSION ACTION:
In Docket No. 2019-230-E, Mr. Enrique McMillon, Jr. (Who I will hereafter refer to as "Complainant") filed a complaint against Duke Energy Carolinas, LLC requesting this Commission find the utility's installation of smart meters to be an unlawful infringement on his personal privacy. Complainant asserts Duke should be treated as a state actor because state regulation authorizes Duke to be the exclusive provider of electric power in its service territory. He claims that permitting Duke to install smart meters without the express consent of each individual customer amounts to unlawful state surveillance in violation of the Fourth Amendment. Complainant further argues that Commission Regulation 103-321 essentially renders all smart meters unlawful, because it requires that "meters shall be read and bills rendered on a monthly basis not less than twenty-eight days nor more than thirty-four days." I move that we find both of these arguments to be without merit, and that we grant Duke's motion to dismiss this complaint.

First, Duke is not a state actor, and Complainant therefore has no constitutional right to privacy that is enforceable against Duke. In Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), the Supreme Court of the United States rejected the argument now advanced by Complainant. In that case, the Court held that a Pennsylvania electric utility with the exclusive right to provide power to its service territory was not a state actor.

Second, Regulation 103-321 merely requires only that meters shall be read and bills rendered monthly. The phrase "not less than twenty-eight days nor more than thirty-four days" defines what constitutes a "monthly basis." It does not prohibit collection of data on a more frequent basis. In Total Environmental Solutions, Inc., 351 S.C. 175, 568 S.E.2d 365 (2002), the Supreme Court of South Carolina reaffirmed its longstanding rule that great deference must be given to an agency's interpretation of regulations where it has particular expertise. Our interpretation stated above is the only reasonable reading of our regulation. Although Complainant contends, at page 2 of his brief opposing Duke's motion to dismiss, that smart meters literally violate the regulation "several times a minute, hundreds of times per hour, and thousands of times per day," this Commission declines to adopt Complainant's interpretation, which would lead to the absurd result of banning all but electromechanical analog meters.

Based upon these legal findings, I move that we grant Duke's motion to dismiss.

If the Complainant wishes to opt out of the AMI meter, he avail himself of Rider MRM, which was approved by the Commission in Order No. 2016-791 and amended in Order No. 2019-429, and have the Company install a manually read meter.

PRESIDING: Randall SESSION: Regular TIME: 2:00 p.m.

	MOTION	YES	NO	OTHER
BELSER	☑	☑	☐	
ERVIN	☐	☑	☐	
HAMILTON	☐	☑	☐	
HOWARD	☐	☐	☐	Absent
RANDALL	☐	☑	☐	
WHITFIELD	☐	☑	☐	
WILLIAMS	☐	☑	☐	

Commission Business

(SEAL)

RECORDED BY: J. Schmieding

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2019-331-E - ORDER NO. 2020-342

JUNE 30, 2020

IN RE: Enrique McMillion, Jr., Complainant/Petitioner v. Duke Energy Carolinas, LLC, Defendant/Respondent	)))	ORDER GRANTING MOTION TO DISMISS

This matter comes before the Public Service Commission of South Carolina ("Commission") on the motion of Duke Energy Carolinas, LLC ("DEC" or "Company") to dismiss the above-captioned Complaint. For the reasons set out herein, the Commission dismisses the Complaint.

HISTORY OF THE DISPUTE

The docket currently before the Commission represents the third complaint filed by Enrique McMillion, Jr. ("McMillion") concerning DEC's attempts to install an AMI (Advanced Metering Infrastructure) meter, often called a "smart meter" at McMillion's home in Anderson County, South Carolina. Since all three dockets are interrelated, a recap of all of them provides context for the Commission's decision herein.

1. Docket No. 2018-379-E

McMillion filed his first complaint, docketed as Docket No. 2018-379-E, on December 3, 2018. In his complaint, McMillion alleged that smart meters violate the 4th, 5th, and 14th Amendments to the U.S. Constitution, and that because smart meters can be used to collect electricity usage information, they violate South Carolina criminal statutes prohibiting eavesdropping, peeping, or voyeurism, as well as conspiracy to engage in

these activities. McMillion sought an order from the Commission requiring DEC to leave its legacy meter[1] in place rather than replacing it with a smart meter.

DEC moved to dismiss the complaint on January 10, 2019, offering in support of its motion that, while the Company had begun full deployment of AMI ("smart") meters in 2016, it recognized that some customers objected to smart meters, and in response, it sought and obtained Commission approval of Rider MRM (Manually Read Meter), which allowed customers to opt out of smart meter installation in favor of a manually read meter at additional cost.[2] The Company represented to the Commission that it had informed McMillion on multiple occasions of the availability of the opt-out program, but that McMillion declined to enroll.

DEC further argued that McMillion's constitutional arguments failed as a matter of law, since DEC is not a state actor, and therefore the 4th, 5th, and 14th Amendments are not applicable to McMillion's complaint. Finally, DEC pointed out that McMillion's allegations based on criminal statutes are outside the jurisdiction of the Commission, and that the specific criminal statutes alleged to have been violated are inapplicable to the facts of this complaint.

On January 30, 2019, in an effort to ensure that McMillion had been afforded the fullest opportunity to state his case and to oppose the Motion to Dismiss, the Commission issued a Directive Order allowing him until February 15, 2019, to submit any additional filings and to oppose the Motion to Dismiss. The Commission further instructed the

[1] In his complaint, McMillion refers to the meter presently installed at his home as an "analog" meter; DEC indicates that the meter is equipped with AMR (Automatic Meter Reading) capability.
[2] Customers opting for manually read meters under Rider MRM are charged a one-time set-up fee of $150.00, divided into six equal installments, and a monthly meter reading fee of $11.75.

Company to make any additional filings no later than March 1, 2019. McMilion did not file any additional materials. The Company filed additional testimony. Over four months passed, and on June 12, 2019, in Order No. 2019-427, the Commission dismissed Docket No. 2018-379-E because McMilion did not make any filing in opposition to the Motion to Dismiss.

2. Docket No. 2019-230-E

On June 17, 2019, five days after the Commission served its Order dismissing Docket No. 2018-379-E, McMilion filed another complaint against DEC, Docket No. 2019-230-E. On his initial complaint form, McMilion sought an order from the Commission barring DEC from installing any smart meter or digital meter until DEC fully disclosed the terms and conditions of service which authorize the utility to replace existing legacy meters with smart meters, and further requiring DEC to produce a writing, signed by McMilion, assenting to those terms and conditions. McMilion also requested that the full tariff be made available for public viewing pursuant to his interpretation of Commission Regulation 103-346, and that the Commission order DEC to perform only one reading of electric usage every 28 days pursuant to his interpretation of Commission Regulation 103-321.

In its Motion to Dismiss, filed on July 3, 2019, DEC provided hyperlinks to the applicable tariff and service regulations and explained that McMilion had ordered electric service by telephone, and that the service regulations were nonetheless effective in the same manner as if McMilion had executed a signed writing. Subsequently, in his filing of September 13, 2019, McMilion attempted to expand the scope of his complaint to

include the same allegations of unlawful surveillance and invasion of privacy he had made in Docket No. 2018-379-E. McMilion further complained of being forced to pay additional fees to opt out of installing a smart meter and instead installing a new manually read digital meter. McMilion would have DEC leave the electromechanical AMR meter in place at no additional cost.

In Order No. 2019-686, issued on September 25, 2019, the Commission dismissed McMilion's complaint in Docket No. 2019-230-E. The Commission rejected McMilion's claims that DEC is a state actor and that its smart meters engage in unlawful surveillance and violate customers' right to privacy, and further found McMilion's position that smart meters violate Commission Regulation 103-321 by continuously monitoring usage data to be untenable, as it would lead to the absurd result of banning all smart meters. The Commission concluded Order No. 2019-686 by reiterating that McMilion may still avail himself of Rider MRM to opt out of smart metering.

On September 26, 2019, McMilion sent an email to Chad Campbell of the Office of Regulatory Staff claiming that the Commission had dismissed his complaint in Docket No. 2019-230-E in error, and a copy of the email was transmitted to the Commission on September 30, 2019. The Commission treated the email as a motion for reconsideration, and in Order No. 2019-724, issued on October 9, 2019, the Commission denied McMilion's motion.

3. Docket No. 2019-331-E

On or about October 16, 2019, McMillion commenced Docket No. 2019-331-E, his third complaint against DEC regarding the same transaction or occurrence that was the subject of his two prior complaints. On October 17, 2019, McMillion requested that he be permitted an extension of 120 days in which to amend his complaint. The Company filed an Answer and Motion to Dismiss on or about November 14, 2019. On November 18, 2019, McMillion moved to strike DEC's Motion to Dismiss and renewed his request for a 120-day extension of time to amend his complaint. In Order No. 2019-822, issued on December 4, 2019, the Commission granted McMillion an extension of time to amend his complaint through January 8, 2020. McMillion's supplemental filing, received by the Commission on January 8, 2020, alleges that DEC has violated the covenant of good faith and fair dealing, the contracts clause of the U.S. Constitution, unconscionable conduct, and "tortious breach of contract" causing economic duress and mental anguish. McMillion requests that the Commission order the Company to honor its "original contract not in dispute," which he views as requiring a signed writing, and to cease and desist "illegal, unlawful, tortious, and bad faith actions." McMillion also requests that Commission Regulation 103-320 be abolished or amended to no longer allow the utility to choose its meters unilaterally.

DEC renewed its Motion to Dismiss on January 28, 2020. By letter on February 6, 2020, and by a follow-up email on February 11, 2020, McMillion requested an extension of four weeks to respond to DEC's Motion to Dismiss. On February 25, 2020,

the Commission issued Order No. 2020-142, granting McMillion until March 2, 2020, to make any additional filing in opposition to DEC's Motion to Dismiss.

In his filing dated March 2, 2020, McMillion took issue with Commissioner Thomas J. Ervin's characterization of his complaint during the Commission's regular business meeting on February 19, 2020. He further interpreted Commissioner Ervin's statement to the effect that the Commission "need[ed] to get this matter concluded" as an indicator of bias. Based upon this allegation of bias, McMillion demanded that all seven[3] Commissioners be recused from his case.

ANALYSIS OF DOCKET NO. 2019-331-E

A. Recusal

McMillion's demand that the entire Commission be recused is based solely upon two statements by Commissioner Thomas J. Ervin during the Commission's business meeting on February 19, 2020: first, that "Mr. McMillion asserts that his contractual relationship with Duke does not authorize the utility to install a smart meter on his home," and second, that "[W]e need to get this matter concluded." Neither of these statements provides a legal basis to require the recusal of Commissioner Ervin alone, and these statements certainly do not support recusal of all the Commissioners.

In *State v. Howard*, 384 S.C. 212, 682 S.E.2d 42 (Ct. App. 2009), the South Carolina Court of Appeals reiterated longstanding case law in upholding a trial judge's denial of a motion to recuse, stating:

[3] Currently, only six Commissioners are actively participating in Commission business. Vice Chairman Justin T. Williams is deployed abroad and is currently on military leave.

> Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal. It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence of bias. Furthermore, the alleged bias must be personal, as distinguished from judicial, in nature.

384 S.C. at 218, 682 S.E.2d at 45, *quoting*, *State v. Cheatham*, 349 S.C. 101, 561 S.E.2d 618 (Ct. App. 2002).

McMilion's unsupported assertions of bias in no way justify recusal of Commissioner Ervin, and they certainly do not justify recusal of the other Commissioners. Even if one infers from Commissioner Ervin's statement that the Commission should "get this matter concluded" that he believes the case is ripe for disposition without a hearing, that, without more, would not be indicative of bias warranting recusal. McMilion has presented no evidence of personal bias or animus on the part of Commissioner Ervin or any other Commissioner. Therefore, McMilion's Motion for Recusal is denied.

In addition to seeking recusal of all of the Commissioners without valid cause, McMilion's March 2, 2020, filing evinces his misperception that he is entitled to conduct discovery and present his case in a hearing in this matter, but that would be the case only if he had raised a material issue of fact which might entitle him to the relief he seeks. Absent any showing of a material issue of fact, his claims are subject to dismissal as a matter of law without discovery or a hearing.

B. McMilion's Requested Relief

McMilion has now filed three complaints since December 2018, with the second almost immediately following dismissal of the first, and the third almost immediately

following dismissal of the second. While each is articulated in a slightly different way, all three complaints essentially seek the same relief. McMillon does not want DEC to install a smart meter on his home, and he also does not want to pay the fees required under Rider MRM in order to opt for a manually read meter. He attempts to challenge DEC's unilateral right to choose the specific meters to be deployed in its service territory and impose upon the Company his own preference for an electromechanical analog meter at no additional cost. However, Commission Regulation 103-320 provides that meters shall be furnished by the utility. There is no provision in the applicable laws and regulations requiring utilities to use meters chosen by customers. He alleges that the manner by which DEC unilaterally chooses to change equipment infringes upon his right to contract. Duke's requirement that McMillon choose between permitting the Company to install a smart meter and paying the fees to install a manually read meter does not violate any contract or other rights. The terms and conditions under which a utility provides service are governed by its tariff and service regulations, not by contracts between the utility and individual customers. It has long been the law that service regulations and tariff provisions approved by the Public Service Commission have the force and effect of law and are binding on utility customers, regardless of whether an individual customer agreed to them. See, e.g., Carroway v. Carolina Power & Light Co., 226 S.C. 237, 84 S.E.2d 728 (1954).

DEC began deploying smart meters throughout its South Carolina service territory in 2016. In Docket No. 2016-354-E, DEC requested Commission approval of Rider MRM to give to its customers who did not want a smart meter the opportunity to choose

to have a manually read meter installed instead. Because the utility incurs the additional costs of having these meters read manually rather than receiving electric consumption data electronically, Rider MRM requires opt-out customers to pay a set-up fee of $150 and a monthly charge of $11.75. The Commission approved Rider MRM in Order No. 2016-791 on November 17, 2016. Rider MRM represents the only non-smart meter option for McMillion. We find that, as a matter of law, Rider MRM does not in any way violate McMillion's legal rights.

C. Res Judicata

The legal doctrine of *res judicata* bars subsequent litigation between identical parties where the claims arise out of the same transaction or occurrence that was the subject of the prior litigation between those same parties. *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 417 S.E.2d 569 (1992). This doctrine bars litigants from raising any issues which were adjudicated in the prior action as well as any issues which might have been raised in the prior action. *Hilton Head Center of South Carolina, Inc. v. Public Service Comm'n of South Carolina*, 294 S.C. 9, 362 S.E.2d 176 (1987).

The complaint currently before us is the third complaint raised by the same individual, against the same utility, arising from the same transaction or occurrence. We have granted the Complainant multiple extensions of time, allowed him to make extra filings for our consideration, and extended other courtesies to him. Following dismissal of Docket No. 2018-379-E, we arguably could have found that Docket No. 2019-230-E was barred by *res judicata*, but we did not. Now, after having twice previously dismissed

complaints arising from the same transaction or occurrence, we adopt *res judicata* as an additional ground warranting dismissal of the complaint.

For all the reasons explained above, we find that Docket No. 2019-331-E should be, and hereby is, dismissed as a matter of law.

This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:

Comer H. Randall

Comer H. "Randy" Randall, Chairman

ATTEST:

Jocelyn Boyd

Jocelyn Boyd, Chief Clerk/Executive Director

Action Item 2

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
COMMISSION DIRECTIVE

ADMINISTRATIVE MATTER	☐	DATE	July 29, 2020
MOTOR CARRIER MATTER	☐	DOCKET NO.	2020-147-E
UTILITIES MATTER	☑	ORDER NO.	

SUBJECT:
DOCKET NO. 2020-147-E - Randy and Cheryl Gilchrist, Complainant/Petitioner v. Duke Energy Carolinas, LLC, Defendant/Respondent - Staff Presents for Commission Consideration Duke Energy Carolinas, LLC's Motion to Dismiss, as well as with the Complainant's Request for Hearing.

COMMISSION ACTION:
We have received a Motion to Dismiss in this Docket. After careful consideration of the filings before this Commission, it appears that no claim has been made by the Complainants upon which relief may be granted. Therefore, Duke Energy Carolinas, LLC's Motion to Dismiss should be granted. However, I would note that the Complainants have made some references to potential medical concerns, and the Company's MRM Rider - the tariff under which a customer may opt in favor of a manually-read meter - has provisions for waiver of fees for medical reasons. There are some requirements for such waiver under the tariff, and I would encourage the Complainants to consider if that is an appropriate option for them.

PRESIDING: Randall SESSION: Regular TIME: 2:00 p.m.

	MOTION	YES	NO	OTHER	
BELSER	☐	☑	☐		voting via videoconference
ERVIN	☑	☑	☐		voting via videoconference
HAMILTON	☐	☑	☐		voting via videoconference
HOWARD	☐	☑	☐		voting via videoconference
RANDALL	☐	☑	☐		voting via videoconference
WHITFIELD	☐	☐	☐	Absent	Sick Leave
WILLIAMS	☐	☐	☐		Military Leave

(SEAL) RECORDED BY: J. Schmieding

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2020-147-E - ORDER NO. 2020-562

AUGUST 24, 2020

IN RE:	Randy and Cheryl Gilchrist, Complainant/Petitioner v. Duke Energy Carolinas, LLC, Defendant/Respondent	ORDER DISMISSING COMPLAINT

This matter comes before the Public Service Commission of South Carolina ("Commission") on a *pro se* Complaint filed by Randy and Cheryl Gilchrist ("Gilchrists" or the "Complainants") against Duke Energy Carolinas, LLC ("DEC" or the "Company"). In the Complaint, filed June 6, 2020, the Gilchrists state that they have been attempting to get DEC to replace a digital meter on their home with an analog or mechanical meter for the past two years. The Complainants cite both privacy concerns and aggravation of medical concerns as cause for DEC to remove the smart meter which is currently installed and replace it with an analog or mechanical meter. Additionally, the Complainants contend that the Company trespassed on their property when installing the new smart meters.

The Complainants compare the privacy concern with the use of activity-tracking devices offered by insurance companies and activity-tracking devices used by law enforcement. The Gilchrists state that insurance companies may not use the devices without the consent of the driver and law enforcement may not use tracking devices without a court order. These uses are not analogous to the current situation which gives rise to the

Complaint. In this case, the device in question is used to meter a service that is billed for on a consumption-basis. Metering of electrical use is a fundamentally necessary part of the provision of electric service.

DEC responded to the Complaint with several points. Regarding the privacy claim been made by the Complainant, the Company cites the Commission Order No. 2019-686:

> Duke is not a state actor, and Complainant therefore has no constitutional right to privacy that is enforceable against Duke. In Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), the Supreme Court of the United States rejected the argument now advanced by Complainant. In that case, the Court held that a Pennsylvania electric utility with the exclusive right to provide power to its service territory was not a state actor.

Since privacy claims such as this can only be raised against state actors – which DEC is not – this claim must be denied.

The Gilchrists make reference to non-specific medical conditions which may be negatively impacted by the local use of smart meters. In response, the Company asserts that the meters that have been deployed to the Gilchrists' home are approved for use by the FCC. Regarding the proposition that Complainants have a choice as to which meter is installed on their home, the Company cites the Commission Order No. 2020-342, citing Regulation 103-320:

> Commission Regulation 103-320 provides that meters shall be furnished by the utility. There is no provision in the applicable laws and regulations requiring utilities to use meters chosen by customers. . . . Duke's requirement that [a customer] choose between permitting the Company to install a smart meter and paying the fees to install a manually read meter does not violate any contract or other rights.

The Company asserts that it no longer supports the use of analog meters, and that such meters have not been manufactured in some time. Given the lack of support for analog meters, and the Company's right to furnish meters under Regulation 103-320, the Complainant's contention that they should be able to choose which meter they have cannot prevail.

The Complainants claim that the Company committed trespass when it entered their property to install the smart meter over the Complainants' objections. The Company correctly asserts S.C. Code Ann. Regs. 103-344 which provides that "[a]uthorized agents of the electrical utility shall the right of access to premises supplied with electric service ... and for any other purpose which is proper and necessary in the conduct of the electrical utility's business." In response, the Gilchrists assert that the installation of the smart meter was neither necessary nor proper in order to provide electric service.

However, Regulation 103-320, when read in conjunction with Regulation 103-344, which recognizes that Company's ability and duty to furnish electric meters, it is clear that the Company has not only permission for access for necessary business purposes, but also a duty to use that permission to furnish meters to its customers. Therefore, it is a proper exercise of business purpose by the Company to access the property and install the new meter. The claim that the Company exceeded its authority to enter the premises for the purpose of installing a meter is denied.

The Commission notes that the Gilchrists advise that they have always paid their bill and do not have an issue with non-payment. However, the Gilchrists assert that they

should not have to opt-out of having a smart meter, but rather, DEC should be asking them to opt-in.

DEC has not violated any statute, nor Commission rule or regulation. Therefore, there is no relief available to the Complainants in this case, and the case must be dismissed. However, the Commission notes that, pursuant to tariffs filed with the Commission, for those customers wishing to have a manually read meter, the MRM Rider is available. The MRM Rider provides for fee-free opt out for customers with medical issues, provided certain requirements are met. The Commission encourages the Complainants to investigate the use of the MRM Rider, if appropriate.

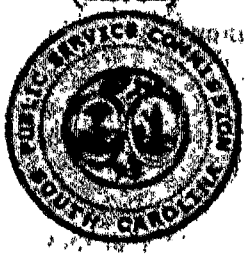
This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:

Comer H. Randall

Comer H. "Randy" Randall, Acting Chairman

(SEAL)



BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2020-147-E – ORDER NO. 2020-644

OCTOBER 1, 2020

IN RE: Randy and Cheryl Gilchrist, Complainant/Petitioner v. Duke Energy Carolinas, LLC, Defendant/Respondent	)))	ORDER DENYING PETITION FOR REHEARING

This matter comes before the Public Service Commission of South Carolina ("the Commission") on a Petition for Rehearing in this Complaint in Docket No. 2020-147-E, filed by the Complainant, Randy and Cheryl Gilchrist, ("the Gilchrists" or "Complainants"). On September 2, 2020, the Complainants filed a Motion for Rehearing of Commission Order No. 2020-562, which granted Duke Energy Carolinas, LLC's ("DEC's") Motion to Dismiss Randy and Cheryl Gilchrist's Complaint in this Docket.

The Gilchrists' Petition is deemed to be properly before the Commission, satisfying S.C. Code of Regs. 103-830 (3) and 103-854. However, the Petition does not state a claim upon which relief may be granted by the Commission, but rather, reiterates the same matters raised in the initial Complaint. To the extent that the Petition for Rehearing is reiterative of the initial Complaint, it fails to satisfy S.C. Code of Regs. 103-825 (A)(4). The Gilchrists' Complaint centers around their opposition to the installation of a "smart meter" by DEC on their premises, and their disinclination to pay the fees required under Rider MRM in order to opt for a manually read meter. The Petition continues to assert their argument that the placement of such meters is a violation of privacy,

unlawful, and violates their constitutional protections. The terms and conditions under which a utility provides service are governed by its tariff and service regulations, not by contracts between the utility and individual customers. Service regulations and tariff provisions approved by the Public Service Commission have the force and effect of law and are binding on utility customers, regardless of whether an individual customer agreed to them. See, e.g., Carroway v. Carolina Power & Light Co., 226 S.C. 237, 84 S.E. 2d 728 (1954).

In the Petition, the Gilchrists did not present a theory or claim upon which the Commission may grant relief. The reasoning for our conclusion dismissing the Gilchrists' Complaint in Order No. 2020-562 is unchanged and we reaffirm it here. Accordingly, the Gilchrists' Petition for Rehearing is denied.

This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:

Justin T. Williams, Chairman
Public Service Commission
South Carolina

Randy and Cheryl Gilchrist

3010 Lake Keowee Lane
Seneca, SC 29672

July 13, 2020

The Honorable Jocelyn G. Boyd
Chief Clerk / Executive Director
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Re: Randy and Cheryl Gilchrist v. Duke Energy Carolinas, LLC
Docket No. 2020-147-E

Dear Ms. Boyd:

Enclosed for filing please find Randy and Cheryl Gilchrist's Objection to Defendant Duke Energy Carolinas, LLC's Motion to Dismiss and plaintiff's Demand for Hearing. By copy of this letter we are serving the same on the parties of record.

Sincerely,

Cheryl Gilchrist

Randy and Cheryl Gilchrist

Cc: Duke Energy via Attorneys for Duke Energy Carolinas, LLC via U.S. mail at
Robinson Gray Stepp & Laffitte, LLC, P.O. Box 11449, Columbia, SC 29211
Alexander W. Knowles, Esq., Office of Regulatory Staff of South Carolina, via email
Carri Grube Lybarker, SC Dept. of Consumer Affairs, Counsel, via email
Roger P. Hall, SC Dept. of Consumer Affairs, Counsel, via email

Enc.: Objection and Demand for Hearing

52

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2020-147-E

IN RE:

Randy and Cheryl Gilchrist, Complainants/Petitioners, v. Duke Energy Carolinas, LLC's Defendant/Respondent.	Randy and Cheryl Gilchrist's Objection to Defendant Duke Energy Carolinas, LLC's Motion to Dismiss and Plaintiff's Demand for Hearing

Plaintiffs, Randy and Cheryl Gilchrist, object to the Motion to Dismiss of Defendant Duke Energy Carolinas, LLC, (hereinafter "DEC" or "Company") on the following grounds:

The purpose of any government agency, commission, or administrative law proceeding is the protection of persons and property. A hearing in this case is necessary for the protection of substantial rights, and is therefore in the public interest. Dismissal of the plaintiff's petition without a hearing is not appropriate under South Carolina Code Ann. § 58-27-1990.

FACTS OF THE CASE

The plaintiffs had repeatedly informed DEC that they did not consent to the installation of any meter capable of capturing data other than what is necessary to bill for services rendered. They repeatedly informed the Company that they were refusing the installation of a smart meter for the following reasons: a) the meter

collects personal, private data that is not necessary to determine the amount of electricity used for billing purposes, and b) residents of the home have medical conditions that could be exacerbated by the smart meter.

The plaintiffs repeatedly informed the Company that they in fact have a right to privacy and that the Company did not obtain their consent for the installation of this meter, and proceeded to threaten plaintiffs with disconnect of their power if they did not comply with the Company's demands. Plaintiffs also informed the Company that they were not required to Opt-Out because the Company was engaging in unlawful activity.

ARGUMENT

DEC claims that they have not violated any applicable statute of regulation for which the Commission can grant relief, claiming that a hearing in this case is not in the public interest or for the protection of substantial rights. The plaintiffs vehemently disagree and submit the following:

1) Insurance companies have devises that monitor and collect data on the activities of the driver of a vehicle. They can offer discounts for the consent of the driver in order to have these devices placed in their vehicle. They can claim all the benefits that the driver might receive should the driver accept the offer. They cannot, however, refuse to provide insurance if the customer declines their offer.

2) Law enforcement cannot place monitoring devices on a home or a car without first presenting probable cause to a judge and obtain a court order for the placement of such a device.

The issue is not about whether DEC is a state actor. The issue is whether DEC can hide behind regulations/statutes to commit unlawful acts. The issue is also whether the Commission, the Public Utilities Commission of South Carolina (hereinafter the "PUC") has in fact authorized DEC to commit these unlawful acts. The plaintiffs contend that regulations promulgated by the PUC do not in fact authorized or excuse illegal activity.

The constitutions of both the United States of America and the State of South Carolina protect the privacy of the individual. Both of the above examples, insurance companies and law enforcement, are prohibited from collecting personal, private data without first obtaining either consent or court order upon probable cause. The Company is required to do the same; they must obtain a customer's consent to install these devices (smart meters) and they cannot penalize or refuse to provide service to customers who do not consent.

The Company did in fact trespass (a Common Law tort) when they entered the plaintiff's property and installed the smart meter over the plaintiff's objections. First, the Company sites S.C. Code Ann. Regs. 103-344, which provides that "[a]uthorized agents of the electrical utility shall the right of access to premises supplied with electric service ... and for any other purpose which is proper and necessary in the conduct of the electrical utility's business." The plaintiffs contend that the purpose was neither proper nor necessary in order to provide electric service.

The above examples of insurance companies and law enforcement demonstrate that the plaintiff's objections to the violation of the right to privacy, which these meters represent, are neither vague nor unspecified. The Company's assertion that

the complainants' privacy assertions can only be asserted against state actors is not the issue here. The issue here is that a state agency (the PUC) that regulates the Company (DEC) is in existence to hear complaints of the Company's unlawful activities and to step in and correct the situation.

CONCLUSION

Again, it is the duty – and even the reason for the existence – of the PUC to protect the persons and property of the people of the State of South Carolina from reckless and unlawful activities that may be engaged in by the companies they regulate. As the Company admits, on page 6 of their motion to dismiss, "...there is no state law requiring the installation of smart meters". There exists no state law because it would be ruled unconstitutional. Every state and every administrative law court, and every government agency, federal and state down to city and county government is bound by the Federal and State Constitutions. The plaintiff's complaint and request for a hearing in this case is in fact in the public interest and for the protection of substantial rights. These substantial rights include the Fourth Amendment to the U.S. Constitution which protects the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.

The following cases are relevant to the substantial rights involved in this case: *Miranda v. Arizona*, 384 U.S. 436, 491: "Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them."

Gomillion v. Lightfoot, 364 U.S. 155 (1966), cited also in *Smith v. Allwright,* 321 U.S. 644, 649: "Constitutional 'rights' would be of little value if they could be indirectly denied."

Davis v. Wechsler, 263 US 22, at 24: "The assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

Hertado v. California, 110 U.S. 516: "The State cannot diminish rights of the people."

Because the PUC is charged with regulating the activities of DEC, plaintiffs believe and have shown that the Company is engaged in activities that are actionable under the Common Law, as well as Statutory Law. These are substantial rights that the PUC is charged to protect, and it is therefore in the public interest that this complaint be heard.

WHEREFORE, the plaintiffs demand that DEC's Motion to Dismiss be denied and a hearing be scheduled as soon as reasonably possible, and request such other relief as the Commission deems just and proper.

Dated July 13, 2020

Respectfully submitted,

Randy and Cheryl Gilchrist
3010 Lake Keowee Lane
Seneca, SC 29672

57

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2020-147-E

IN RE:

Randy and Cheryl Gilchrist, Complainants/Petitioners, v. Duke Energy Carolinas, LLC's Defendant/Respondent.	]]]]]]]	CERTIFICATE OF SERVICE

This is to certify that I, Randy Gilchrist, one of the plaintiffs in this case, have served upon the persons named below our Objection to Defendant Duke Energy Carolinas, LLC's Motion to Dismiss and Plaintiff's Demand for Hearing by electronic mail or by depositing in the U.S. Mail, addressed as follows:

Alexander W. Knowles, Counsel
SC Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, SC 29201
aknowles@ors.sc.gov

The Honorable Jocelyn G. Boyd
Chief Clerk / Executive Director
Public Service Commission of
South Carolina
101 Executive Center Drive
Suite 100
Columbia, SC 29210

Carri Grube Lybarker, Counsel
SC Dept. of Consumer Affairs
clybarker@scconsumer.gov

Roger P. Hall, Counsel
SC Department of Consumer Affairs
P.O. Box 5757
Columbia, SC 29250
Rhall@scconsumer.gov

Robinson Gray Stepp & Lafitte, LLC
P.O. Box 11449
Columbia, SC 29211
Attorneys for Duke Energy Carolinas LLC

Dated July 13, 2020

Randy Gilchrist

Cheryl Gilchrist

58

Randy and Cheryl Gilchrist

3010 Lake Keowee Lane
Seneca, SC 29672

July 24, 2020

The Honorable Jocelyn G. Boyd
Chief Clerk / Executive Director
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Re: Randy and Cheryl Gilchrist v. Duke Energy Carolinas, LLC
Docket No. 2020-147-E

Dear Ms. Boyd:

Enclosed for filing please find Randy and Cheryl Gilchrist's second Objection to Defendant Duke Energy Carolinas, LLC's Motion to Dismiss and plaintiff's Demand for Hearing dated July 24, 2020. By copy of this letter we are serving the same on the parties of record.

Sincerely,

Randy and Cheryl Gilchrist

Cc: Duke Energy via Attorneys for Duke Energy Carolinas, LLC via U.S. mail at
Robinson Gray Stepp & Laffitte, LLC, P.O. Box 11449, Columbia, SC 29211
Mr. David Stark, Hearing Examiner, Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100, Columbia, SC 29210
Alexander W. Knowles, Esq., Office of Regulatory Staff of South Carolina, via email
Carri Grube Lybarker, SC Dept. of Consumer Affairs, Counsel, via email
Roger P. Hall, SC Dept. of Consumer Affairs, Counsel, via email

Enc.: Objection and Demand for Hearing

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2020-147-E

IN RE:

Randy and Cheryl Gilchrist, Complainants/Petitioners,	]	
v.	]	CERTIFICATE OF SERVICE
Duke Energy Carolinas, LLC's Defendant/Respondent.	]	

This is to certify that I, Randy Gilchrist, one of the plaintiffs in this case, have served upon the persons named below our second Objection to Defendant Duke Energy Carolinas, LLC's Motion to Dismiss and Plaintiff's Demand for Hearing by electronic mail or by depositing in the U.S. Mail, addressed as follows:

Alexander W. Knowles, Counsel
SC Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, SC 29201
aknowles@ors.sc.gov

The Honorable Jocelyn G. Boyd
Chief Clerk / Executive Director
Public Service Commission of
South Carolina
101 Executive Center Drive
Suite 100
Columbia, SC 29210

Mr. David Stark, Hearing Examiner
PSC of SC, 101 Executive Ctr. Dr.
Ste. 100, Columbia, SC 29210

Carri Grube Lybarker, Counsel
SC Dept. of Consumer Affairs
clybarker@scconsumer.gov

Roger P. Hall, Counsel
SC Department of Consumer Affairs
P.O. Box 5757
Columbia, SC 29250
Rhall@scconsumer.gov

Robinson Gray Stepp & Lafitte, LLC
P.O. Box 11449
Columbia, SC 29211
Attorneys for Duke Energy Carolinas LLC

Dated July 24, 2020

Randy Gilchrist

Cheryl Gilchrist

60

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2020-147-E

IN RE:

Randy and Cheryl Gilchrist, Complainants/Petitioners, v. Duke Energy Carolinas, LLC's Defendant/Respondent.	]]]]]]]]	Randy and Cheryl Gilchrist's Objection to Defendant Duke Energy Carolinas, LLC's Motion to Dismiss and Plaintiff's Demand for Hearing

Plaintiffs, Randy and Cheryl Gilchrist, object to the Motion to Dismiss of Defendant Duke Energy Carolinas, LLC, (hereinafter "DEC" or "Company") dated July 20,2020 on the following grounds:

The purpose of any government agency, commission, or administrative law proceeding is the protection of persons and property. A hearing in this case is necessary for the protection of substantial rights, and is therefore in the public interest. Dismissal of the plaintiff's petition without a hearing is not appropriate under South Carolina Code Ann. § 58-27-1990.

FACTS OF THE CASE

The plaintiffs had repeatedly informed DEC that they did not consent to the installation of any meter capable of capturing data other than what is necessary to

bill for services rendered. We repeatedly informed the Company that we were refusing the installation of a smart meter for the following reasons:

a) the meter collects personal, private data that is not necessary to determine the amount of electricity used for billing purposes, and b) residents of the home have medical conditions that could be exacerbated by the smart meter.

The plaintiffs repeatedly informed the Company that they in fact have a right to privacy and that the Company did not obtain their consent for the installation of this meter, and proceeded to threaten plaintiffs with disconnect of their power if they did not comply with the Company's demands. Plaintiffs also informed the Company that they were not required to Opt-Out because the Company was engaging in unlawful activity.

ARGUMENT

DEC (the Company) claims that they have not violated any applicable statute or regulation for which the Commission can grant relief, claiming that a hearing in this case is not in the public interest or for the protection of substantial rights. The plaintiffs vehemently disagree and submit the following:

1) DEC in its July 20, 2020, response to our complaint asserts that they have offered plaintiffs an opportunity to "opt out." What they should be offering their customers is an opportunity to opt in...this after fully informing their customers of the true nature of the meter's capabilities and the uses of the information collected. There is no question that the smart meters collect and store data well beyond what is necessary for billing purposes. This data is the

personal, private property of the plaintiffs. The Company has no right or authority to force anyone to allow them to collect that data under threat of disconnection of service for noncompliance. The Company cites "S.C. Code Ann. § 58-3-140(A)" as their regulatory authority. The Company claims that "[i]t is indisputable that the replacement of an analog meter ... is well within the scope of these grants of authority." The plaintiffs dispute that claim. The Commission cannot grant authority that violates our Constitutional protections. The Commission in fact takes an oath of office, S. C. Code of Laws, Title 58, Ch. 3, Sec. 58330, to support and defend our Constitutions, both State and Federal. Any regulations that violate those Constitutions are null and void. All courts – and that includes Administrative Courts – are bound by those Constitutions. The U. S. Supreme Court said:

> Constitutional provisions for the security of person and property are to be liberally construed, and "it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Byars v. U.S.*, 273 U.S. 28, 32 (1927)

The South Carolina Code of Laws, Sec. 16, Ch. 5, entitled *Offences Against Civil Rights*, Sec. 16510, *Conspiracy against civil rights* reads:

> It is unlawful for two or more persons to band or conspire together or go in disguise upon the public highway or upon the premises of another with the intent to injure, oppress, or violate the person or property of a citizen because of his political opinion or his expression or exercise of the same or attempt by any means, measure, or acts to

hinder, prevent, or obstruct a citizen in the free exercise and enjoyment of any right or privilege secured to him by the Constitution and laws of the United States or by the Constitution and laws of this State.

2) The Company claims to be "authorized" by the Commission to engage in acts that are unlawful and claims that because they are not a "state actor" that the Company does not need to comply with the constitutions of our state and federal governments. We disagree, and furthermore, this puts the Commission (which is a state actor) in a precarious position. Thus, the Commission either needs to inform the Company that they must comply with Constitutional provisions that protect the privacy and property of their customers, or write regulations that explicitly state the same.

The Company cites Commission regulation 103-320 that provides "meters shall be furnished by the utility." This does not mean that the Company can use any meter – specifically smart meters – that collect and store data which is the personal, private property of the plaintiffs, and which is not necessary for billing purposes, regardless of any "benefits" the Company claims are yielded. The Company is not allowed to violate plaintiffs' rights to their property because it's "convenient." In order for the placement of smart meters to be lawful, the Company must fully inform their customers of the capabilities of the meters and the uses of the information these meters collect. And,

the Company must obtain the informed consent of the customer. Without such informed consent, the Company is committing unlawful acts with the installation of every smart meter. If the Commission sanctions the Company's actions, then the Commission, as a state actor, may be liable for damages caused by the Company.

The issue is not about whether DEC is a state actor. The issue is whether DEC can hide behind regulations/statutes to commit unlawful acts. The issue is also whether the Commission, the Public Service Commission of South Carolina (hereinafter the "PSC") has in fact authorized DEC to commit these unlawful acts. The plaintiffs contend that regulations promulgated by the PSC do not in fact authorize or excuse illegal activity.

The constitutions of both the United States of America and the State of South Carolina protect the privacy of the individual. The company is prohibited from collecting personal, private data without first obtaining informed consent of their customers. The Company is required to obtain a customer's consent to install these devices (smart meters) and they cannot penalize or refuse to provide service to customers who do not consent.

The Company did in fact trespass (a Common Law tort) when they entered the plaintiffs' property and installed the smart meter over the plaintiffs' objections. The Company sites S.C. Code Ann. Regs. 103-344, which provides that "[a]uthorized agents of the electrical utility shall have the right of access to premises supplied with electric service ... and for any other purpose which is proper and necessary in the

conduct of the electrical utility's business." The plaintiffs contend that the purpose was neither proper nor necessary in order to provide electric service.

The plaintiffs' objections to the violation of the right to privacy, which these meters represent, are neither vague nor unspecified. The Company's assertion that the complainants' privacy assertions can only be asserted against state actors is not the issue here. The issue here is that a state agency (the PSC) that regulates the Company (DEC) is in existence to hear complaints of the Company's unlawful activities and to step in and correct the situation.

CONCLUSION

Again, it is the duty – and even the reason for the existence – of the PSC to protect the persons and property of the people of the State of South Carolina from reckless and unlawful activities that may be engaged in by the companies they regulate. As the Company admits on page 6 of their motion to dismiss dated July 8, 2020, "...there is no state law requiring the installation of smart meters". There exists no state law because it would be ruled unconstitutional. Every state and every administrative law court, and every government agency, federal and state down to city and county government is bound by the Federal and State Constitutions. The plaintiffs' complaint and request for a hearing in this case is in fact in the public interest and for the protection of substantial rights. These substantial rights include the Fourth Amendment to the U.S. Constitution which protects the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.

The following cases are relevant to the substantial rights involved in this case:

Miranda v. Arizona, 384 U.S. 436, 491:

"Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them."

Gomillion v. Lightfoot, 864 U.S. 155 (1966); cited also in *Smith v. Allwright*, 321 U.S. 644, 649:

"Constitutional rights' would be of little value if they could be indirectly denied."

Davis v. Wechsler, 263 US 22, at 24:

"The assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

Hertado v. California, 110 U.S. 516:

"The State cannot diminish rights of the people."

Because the PSC is charged with regulating the activities of DEC, plaintiffs believe and have shown that the Company is engaged in activities that are actionable under the Common Law, as well as Statutory Law. These are substantial rights that the PSC is charged to protect, and it is therefore in the public interest that this complaint be heard.

WHEREFORE, the plaintiffs demand that DEC's Motion to Dismiss be denied and a hearing be scheduled as soon as reasonably possible, and request such other relief as the Commission deems just and proper.

Dated July 24, 2020

Respectfully submitted,

Randy A Gilchrist

Cheryl Gilchrist

Randy and Cheryl Gilchrist
3010 Lake Keowee Lane
Seneca, SC 29672

Katie M. Brown
Counsel

Duke Energy
40 W. Broad Street
DSC 556
Greenville, SC 29601

O: 864-370-5296
F. 864-370-5027

Katie.Brown2@duke-energy.com

July 20, 2020

VIA ELECTRONIC FILING
The Honorable Jocelyn G. Boyd
Chief Clerk/ Executive Director
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Re: Randy and Cheryl Gilchrist v. Duke Energy Carolinas, LLC
Docket Number: 2020-147-E

Dear Ms. Boyd:

Pursuant to S.C. Code Ann. § 58-27-1990, S.C. Code Ann. Regs 103-829 and 103-352, and applicable South Carolina law, Duke Energy Carolinas, LLC ("DEC" or the "Company") hereby replies to Complainants' response to DEC's Motion to Dismiss filed in the above-referenced proceeding on July 15, 2020 ("Response").

The Gilchrists filed a complaint in the above-referenced proceeding, which was docketed on June 8, 2020, expressing their objection to the installation of a smart meter. As explained in the Company's Motion to Dismiss, the Complaint fails to adequately allege any violation of a Commission-jurisdictional statute or regulation, and a hearing in this case is not necessary for the protection of substantial rights. Therefore, this matter should be dismissed.

In their Response, Complainants rely on two examples in support of their objections to installation of a smart meter: (1) insurance companies offering monitoring devices that collect data on a driver's activities and (2) law enforcement placing monitoring devices on a home or car. These examples are irrelevant to the Company's use of electric meters to measure its customers' electricity consumption.

Complainants' reference to optional monitoring devices offered by insurance companies does not apply in this case. Complainants have been provided multiple opportunities to elect to have a manually read meter installed and have failed to avail themselves of that option. As previously explained, there are additional costs to providing manual service as meter readers must physically visit the customer's premises. However, to the extent Complainants assert the existence

of a medical condition that could be exacerbated by a smart meter, the associated fees may be waived pursuant to the terms of the MRM rider.

Complainants' assertion that the installation of smart meters is analogous to law enforcement use of monitoring devices is similarly flawed. First, customer electricity usage information is a business record necessary to determine how much the utility should bill the customer for use of the service. As previously explained, if the customer has not opted for a manually read meter and instead uses a smart meter, interval data is transmitted to the Company in order to enable certain customer benefits (e.g., giving customers more information about how they use energy, permitting customers to stay better informed during outages, control due dates, etc.). These customer benefits and the need to bill for electricity consumption are wholly divorced from the context and purpose of law enforcement investigations. Second, any constitutional claim concerning privacy rights may only be asserted against state actors, which the Company is not. The Commission recently addressed a similar complaint and concluded:

> Duke is not a state actor, and Complainant therefore has no constitutional right to privacy that is enforceable against Duke. In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), the Supreme Court of the United States rejected the argument now advanced by Complainant. In that case, the Court held that a Pennsylvania electric utility with the exclusive right to provide power to its service territory was not a state actor.

Order No. 2019-686, Docket No. 2019-230-E (Sept. 25, 2019). The Company is a private actor, and no state action is conducted in the Company's installation and use of smart meters. *See also Benlian v. PECO Energy Corp.*, No. CV 15-2128, 2016 WL 3951664, at *7 (E.D. Pa. July 20, 2016) ("The installation of smart meters, and the provision of electricity to customers such as Benlian, is a business activity, and not a state function or a state action.").

As previously explained in the Company's Motion to Dismiss, the customer does not have absolute choice as to the meter employed by the utility to measure its customers' electricity. This issue was recently addressed in a Commission order, which provides as follows:

> Commission Regulation 103-320 provides that meters shall be furnished by the utility. There is no provision in the applicable laws and regulations requiring utilities to use meters chosen by customers. . . . Duke's requirement that [a customer] choose between permitting the Company to install a smart meter and paying the fees to install a manually read meter does not violate any contract or other rights.

Order No. 2020-342 at 8, Docket No. 2019-331-E (June 30, 2020).

Finally, Complainants reassert that the Company trespassed on their property, and that the Commission lacks authority to permit a utility to carry out its necessary functions, including, for example, replacing the equipment it uses to measure service usage. To the contrary, South Carolina state law vests the Commission

> with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State and to fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State.

S.C. Code Ann. § 58-3-140(A). Pursuant to this broad regulatory authority, the Commission has promulgated regulations 103-320, which is discussed above, and 103-344, which provides electric utilities with the right of access to premises supplied with electric service "for the purpose of reading meters, maintenance, repair, and for any other purpose which is proper and necessary in the conduct of the electrical utility's business." It is indisputable that the replacement of an analog meter that is no longer supported with either a smart meter or a manually read meter—if elected by the customer—is well within the scope of these grants of authority.

DEC restates its request that the Complaint be dismissed pursuant to S.C. Code Ann. § 58-27-1990, because the Complaint fails to allege any violation of a Commission-jurisdictional statute or regulation, and a hearing in this case is not necessary for the protection of substantial rights.

Sincerely,

Katie M. Brown

Katie M. Brown

Enclosure

cc: Randy and Cheryl Gilchrist (via U.S. Mail)
Alexander Knowles, ORS (via email)
Carri Grube Lybarker, SC Department of Consumer Affairs (via email)
Frank R. Ellerbe, III (via email)
Roger P. Hall, SC Department of Consumer Affairs (via email)
Samuel J. Wellborn (via email)

BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2020-147-E

Randy and Cheryl Gilchrist, Complainant/Petitioner, v. Duke Energy Carolinas, LLC, Defendant/Respondent.	**NOTICE OF APPEARANCE**

Please accept for filing this Notice of Appearance of Katie M. Brown, Esquire as counsel of record for Duke Energy Carolinas, LLC in this proceeding. I request that the Commission note my appearance for the record and add my name as attorney of record for Duke Energy Carolinas, LLC. A copy of this Notice is being served on all parties of record. I request that any further information or correspondence filed with the Commission be served on the undersigned as counsel for Duke Energy Carolinas, LLC.

Dated this 20th day of July, 2020.

s/Katie M. Brown
Katie M. Brown, Counsel
Duke Energy Corporation
40 West Broad Street, DSC 556
Greenville, SC 29601
Telephone: 864.370.5296
katie.brown2@duke-energy.com

Attorney for Duke Energy Carolinas, LLC

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
COMMISSION DIRECTIVE

ADMINISTRATIVE MATTER	☐	DATE	July 15, 2020
MOTOR CARRIER MATTER	☐	DOCKET NO.	2020-147-E
UTILITIES MATTER	☑	ORDER NO.	2020-484

THIS DIRECTIVE SHALL SERVE AS THE COMMISSION'S ORDER ON THIS ISSUE.

Order Granting Request to Hold All Prefiled Dates and Hearing in Abeyance Pending Commission Consideration of Company's Motion to Dismiss

SUBJECT:
DOCKET NO. 2020-147-E - Randy and Cheryl Gilchrist, Complainant/Petitioner v. Duke Energy Carolinas, LLC, Defendant/Respondent - Staff Presents for Commission Consideration Duke Energy Carolinas, LLC's Motion to Dismiss, along with the Renewed Request to Hold Hearing and Filing Deadlines in Abeyance.

COMMISSION ACTION:
Grant the Company's request to hold all prefiled dates and the hearing date in abeyance pending Commission consideration of the Company's Motion to Dismiss.

PRESIDING: Randall SESSION: Regular TIME: 2:00 p.m.

	MOTION	YES	NO	OTHER	
BELSER	☐	☑	☐		voting via videoconference
ERVIN	☑	☑	☐		voting via videoconference
HAMILTON	☐	☑	☐		voting via videoconference
HOWARD	☐	☑	☐		voting via videoconference
RANDALL	☐	☑	☐		voting via videoconference
WHITFIELD	☐	☑	☐		voting via videoconference
WILLIAMS	☐	☐	☐	Absent	Military Leave

(SEAL)

RECORDED BY: J. Schmieding

Randy and Cheryl Gilchrist

3010 Lake Keowee Lane
Seneca, SC 29672

August 6, 2020

The Honorable Jocelyn G. Boyd
Chief Clerk / Executive Director
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Re: Randy and Cheryl Gilchrist v. Duke Energy Carolinas, LLC
Docket No. 2020-147-E

Dear Ms. Boyd:

Enclosed for filing please find Randy and Cheryl Gilchrist's Petition for Hearing dated August 6, 2020. By copy of this letter we are serving the same on the parties of record.

Sincerely,

Randy Gilchrist

Cheryl Gilchrist

Randy and Cheryl Gilchrist

Cc: Duke Energy via Attorneys for Duke Energy Carolinas, LLC via U.S. mail at
Robinson Gray Stepp & Laffitte, LLC, P.O. Box 11449, Columbia, SC 29211
Mr. David Stark, Hearing Examiner, Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100, Columbia, SC 29210
Alexander W. Knowles, Esq., Office of Regulatory Staff of South Carolina, via email
Carri Grube Lybarker, SC Dept. of Consumer Affairs, Counsel, via email
Roger P. Hall, SC Dept. of Consumer Affairs, Counsel, via email

Enc.: Petition for Re-Hearing
Commission Order, July 29, 2020

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2020-147-E

IN RE:

Randy and Cheryl Gilchrist, Complainants/Petitioners,	]	
v.	]	CERTIFICATE OF SERVICE
Duke Energy Carolinas, LLC's Defendant/Respondent.	]	

This is to certify that I, Randy Gilchrist, one of the plaintiffs in this case, have served upon the persons named below Plaintiff's Petition for Hearing by electronic mail or by depositing in the U.S. Mail, addressed as follows:

Alexander W. Knowles, Counsel
SC Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, SC 29201
aknowles@ors.sc.gov

The Honorable Jocelyn G. Boyd
Chief Clerk / Executive Director
Public Service Commission of South Carolina
101 Executive Center Drive
Suite 100
Columbia, SC 29210

Mr. David Stark, Hearing Examiner
PSC of SC, 101 Executive Ctr. Dr.
Ste. 100, Columbia, SC 29210

Carri Grube Lybarker, Counsel
SC Dept. of Consumer Affairs
clybarker@scconsumer.gov

Roger P. Hall, Counsel
SC Department of Consumer Affairs
P.O. Box 5757
Columbia, SC 29250
Rhall@scconsumer.gov

Robinson Gray Stepp & Lafitte, LLC
P.O. Box 11449
Columbia, SC 29211
Attorneys for Duke Energy Carolinas LLC

Dated August 6, 2020

Randy A. Gilchrist
Randy Gilchrist

Cheryl Gilchrist

75

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2020-147-E

IN RE:

Randy and Cheryl Gilchrist, Complainants/Petitioners, v. Duke Energy Carolinas, LLC's Defendant/Respondent.	]]]]]]]]	Randy and Cheryl Gilchrist's Petition for Re - Hearing

Plaintiffs, Randy and Cheryl Gilchrist, Respectfully request that the commission grant this request for a re-hearing in this matter, as it is in the public interest and substantial rights are being violated.

The purpose of any government agency, commission, or administrative law proceeding is the protection of persons and property. A hearing in this case is necessary for the protection of substantial rights, and is therefore in the public interest. Dismissal of the plaintiff's petition without a hearing is not appropriate under South Carolina Code Ann. § 58-27-1990. We have evidence to support our claims and should have an opportunity to present this evidence at a hearing. The commission is subject to both the United States Constitution and the Constitution of the State of South Carolina. Therefore, the issues we have raised are well within the purview of the commission and state a claim upon which relief can be granted.

FACTS OF THE CASE

The plaintiffs had repeatedly informed DEC that they did not consent to the installation of any meter capable of capturing data other than what is necessary to bill for services rendered. We repeatedly informed the Company that we were refusing the installation of a smart meter for the following reasons:

a) the meter collects personal, private data that is not necessary to determine the amount of electricity used for billing purposes, and b) residents of the home have medical conditions that could be exacerbated by the smart meter.

The plaintiffs repeatedly informed the Company that they in fact have a right to privacy and that the Company did not obtain their consent for the installation of this meter, and proceeded to threaten plaintiffs with disconnect of their power if they did not comply with the Company's demands. Plaintiffs also informed the Company that they were not required to Opt-Out because the Company was engaging in unlawful activity.

ARGUMENT

DEC (the Company) claims that they have not violated any applicable statute or regulation for which the Commission can grant relief, claiming that a hearing in this case is not in the public interest or for the protection of substantial rights. The plaintiffs vehemently disagree and submit the following:

1) DEC in its July 20, 2020, response to our complaint asserts that they have offered plaintiffs an opportunity to "opt out." What they should be offering their customers is an opportunity to opt in...this after fully informing their

customers of the true nature of the meter's capabilities and the uses of the information collected. There is no question that the smart meters collect and store data well beyond what is necessary for billing purposes. This data is the personal, private property of the plaintiffs. The Company has no right or authority to force anyone to allow them to collect that data under threat of disconnection of service for noncompliance. The Company cites "S.C. Code Ann. § 58-3-140(A)" as their regulatory authority. The Company claims that "[i]t is indisputable that the replacement of an analog meter ... is well within the scope of these grants of authority." The plaintiffs dispute that claim. The Commission cannot grant authority that violates our Constitutional protections. The Commission in fact takes an oath of office, S. C. Code of Laws, Title 58, Ch. 3, Sec. 58330, to support and defend our Constitutions, both State and Federal. Any regulations that violate those Constitutions are null and void. All courts – and that includes Administrative Courts – are bound by those Constitutions. The U. S. Supreme Court said:

> Constitutional provisions for the security of person and property are to be liberally construed, and "it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Byars v. U.S.*, 273 U.S. 28, 32 (1927)

The South Carolina Code of Laws, Sec. 16, Ch. 5, entitled *Offences Against Civil Rights*, Sec. 16510, *Conspiracy against civil rights* reads:

> It is unlawful for two or more persons to band or conspire together or go in disguise upon the public highway or upon the premises of

78

another with the intent to injure, oppress, or violate the person or property of a citizen because of his political opinion or his expression or exercise of the same or attempt by any means, measure, or acts to hinder, prevent, or obstruct a citizen in the free exercise and enjoyment of any right or privilege secured to him by the Constitution and laws of the United States or by the Constitution and laws of this State.

2) The Company claims to be "authorized" by the Commission to engage in acts that are unlawful and claims that because they are not a "state actor" that the Company does not need to comply with the constitutions of our state and federal governments. We disagree, and furthermore, this puts the Commission (which is a state actor) in a precarious position. Thus, the Commission either needs to inform the Company that they must comply with Constitutional provisions that protect the privacy and property of their customers, or write regulations that explicitly state the same.

The Company cites Commission regulation 103-320 that provides "meters shall be furnished by the utility." This does not mean that the Company can use any meter – specifically smart meters – that collect and store data which is the personal, private property of the plaintiffs, and which is not necessary for billing purposes, regardless of any "benefits" the Company claims are yielded. The Company is not allowed to violate plaintiffs' rights to their property because it's

"convenient." In order for the placement of smart meters to be lawful, the Company must fully inform their customers of the capabilities of the meters and the uses of the information these meters collect. And, the Company must obtain the informed consent of the customer. Without such informed consent, the Company is committing unlawful acts with the installation of every smart meter. If the Commission sanctions the Company's actions, then the Commission, as a state actor, may be liable for damages caused by the Company.

The issue is not about whether DEC is a state actor. The issue is whether DEC can hide behind regulations/statutes to commit unlawful acts. The issue is also whether the Commission, the Public Service Commission of South Carolina (hereinafter the "PSC") has in fact authorized DEC to commit these unlawful acts. The plaintiffs contend that regulations promulgated by the PSC do not in fact authorize or excuse illegal activity.

The constitutions of both the United States of America and the State of South Carolina protect the privacy of the individual. The company is prohibited from collecting personal, private data without first obtaining informed consent of their customers. The Company is required to obtain a customer's consent to install these devices (smart meters) and they cannot penalize or refuse to provide service to customers who do not consent.

The Company did in fact trespass (a Common Law tort) when they entered the plaintiffs' property and installed the smart meter over the plaintiffs' objections. The Company sites S.C. Code Ann. Regs. 103-344, which provides that "[a]uthorized

agents of the electrical utility shall have the right of access to premises supplied with electric service ... and for any other purpose which is proper and necessary in the conduct of the electrical utility's business." The plaintiffs contend that the purpose was neither proper nor necessary in order to provide electric service.

The plaintiffs' objections to the violation of the right to privacy, which these meters represent, are neither vague nor unspecified. The Company's assertion that the complainants' privacy assertions can only be asserted against state actors is not the issue here. The issue here is that a state agency (the PSC) that regulates the Company (DEC) is in existence to hear complaints of the Company's unlawful activities and to step in and correct the situation.

CONCLUSION

Again, it is the duty – and even the reason for the existence – of the PSC to protect the persons and property of the people of the State of South Carolina from reckless and unlawful activities that may be engaged in by the companies they regulate. As the Company admits on page 6 of their motion to dismiss dated July 8, 2020, "...there is no state law requiring the installation of smart meters". There exists no state law because it would be ruled unconstitutional. Every state and every administrative law court, and every government agency, federal and state down to city and county government is bound by the Federal and State Constitutions. The plaintiffs' complaint and request for a hearing in this case is in fact in the public interest and for the protection of substantial rights. These substantial rights include the Fourth Amendment to the U.S. Constitution which protects the right of the

people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."

The following cases are relevant to the substantial rights involved in this case:

Miranda v. Arizona, 384 U.S. 436, 491:

"Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them."

Gomillion v. Lightfoot, 364 U.S. 155 (1966), cited also in *Smith v. Allwright*, 321 U.S. 644, 649:

"Constitutional 'rights' would be of little value if they could be indirectly denied."

Davis v. Wechsler, 263 US 22, at 24:

"The assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

Hertado v. California, 110 U.S. 516:

"The State cannot diminish rights of the people."

Because the PSC is charged with regulating the activities of DEC, plaintiffs believe and have shown that the Company is engaged in activities that are actionable under the Common Law, as well as Statutory Law. These are substantial rights that the PSC is charged to protect, and it is therefore in the public interest that this complaint be heard.

WHEREFORE, the plaintiffs demand that DEC's Motion to Dismiss be denied and a re- hearing be scheduled as soon as reasonably possible, so that we mat present evidence to support our claims, as is our right to due process under the law. We request such other relief as the Commission deems just and proper.

Dated August 6,, 2020

Respectfully submitted,

Randy and Cheryl Gilchrist
3010 Lake Keowee Lane
Seneca, SC 29672

83

Randy and Cheryl Gilchrist

3010 Lake Keowee Lane
Seneca, SC 29672

August 27, 2020

The Honorable Jocelyn G. Boyd
Chief Clerk / Executive Director
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Re: Randy and Cheryl Gilchrist v. Duke Energy Carolinas, LLC
Docket No. 2020-147-E

Dear Ms. Boyd:

Enclosed for filing please find Randy and Cheryl Gilchrist's Petition for Hearing dated August 27, 2020. By copy of this letter we are serving the same on the parties of record.

Sincerely,

Randy Gilchrist

Cheryl Gilchrist

Randy and Cheryl Gilchrist

Cc: Duke Energy via Attorneys for Duke Energy Carolinas, LLC via U.S. mail at
Robinson Gray Stepp & Laffitte, LLC, P.O. Box 11449, Columbia, SC 29211
Mr. David Stark, Hearing Examiner, Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100, Columbia, SC 29210
Alexander W. Knowles, Esq., Office of Regulatory Staff of South Carolina, via email
Carri Grube Lybarker, SC Dept. of Consumer Affairs, Counsel, via email
Roger P. Hall, SC Dept. of Consumer Affairs, Counsel, via email

Enc.: Petition for Rehearing
Commission Order, July 29, 2020

SOUTH CAROLINA PUBLIC SERVICE COMMISSION
HEARING EXAMINER DIRECTIVE

DOCKET NO. 2020-147-E Order No. 2020-80-H

AUGUST 25, 2020

Hearing Officer: David Butler

DOCKET DESCRIPTION:
Randy and Cheryl Gilchrist, Complainant/Petitioner v. Duke Energy Carolinas, LLC, Defendant/Respondent

MATTER UNDER CONSIDERATION:
Petition for Rehearing

HEARING EXAMINER'S ACTION:
On August 10, 2020, the Complainant in Docket No. 2020-147-E filed a Petition for Rehearing. The Commission's Order No. 2020-562, which dismissed the original Complaint, was issued August 24, 2020. The Complainant's Petition for Rehearing was filed prematurely and must be dismissed. However, now that the Commission Order has been issued, the Complainant now has an opportunity to timely seek rehearing, if they so desire. Simply refiling the August 10th Petition, with any modification desired by the Complainant, would suffice for this purpose.

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2020-147-E

IN RE:

Randy and Cheryl Gilchrist, Complainants/Petitioners,	
v.	**CERTIFICATE OF SERVICE**
Duke Energy Carolinas, LLC's Defendant/Respondent.	

This is to certify that I, Randy Gilchrist, one of the plaintiffs in this case, have served upon the persons named below Plaintiff's Petition for Rehearing by electronic mail or by depositing in the U.S. Mail, addressed as follows:

Alexander W. Knowles, Counsel
SC Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, SC 29201
aknowles@ors.sc.gov

The Honorable Jocelyn G. Boyd
Chief Clerk / Executive Director
Public Service Commission of South Carolina
101 Executive Center Drive
Suite 100
Columbia, SC 29210

Mr. David Stark, Hearing Examiner
PSC of SC, 101 Executive Ctr. Dr.
Ste. 100, Columbia, SC 29210

Carri Grube Lybarker, Counsel
SC Dept. of Consumer Affairs
clybarker@scconsumer.gov

Roger P. Hall, Counsel
SC Department of Consumer Affairs
P.O. Box 5757
Columbia, SC 29250
Rhall@scconsumer.gov

Robinson Gray Stepp & Lafitte, LLC
P.O. Box 11449
Columbia, SC 29211
Attorneys for Duke Energy Carolinas LLC

Dated: August 27, 2020

Randy Gilchrist

86

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2020-147-E

IN RE:

Randy and Cheryl Gilchrist, Complainants/Petitioners,	
v.	Randy and Cheryl Gilchrist's Petition for Rehearing
Duke Energy Carolinas, LLC's Defendant/Respondent.	

Plaintiffs, Randy and Cheryl Gilchrist, respectfully request that the commission grant this request for a rehearing in this matter, as it is in the public interest and substantial rights are being violated.

The purpose of any government agency, commission, or administrative law proceeding is the protection of persons and property. A hearing in this case is necessary for the protection of substantial rights, and is therefore in the public interest. Dismissal of the plaintiff's petition without a hearing is not appropriate under South Carolina Code Ann. § 58-27-1990. We have evidence to support our claims and should have an opportunity to present this evidence at a hearing. The commission is subject to both the United States Constitution and the Constitution of the State of South Carolina. Therefore, the issues we have raised are well within the purview of the commission and state a claim upon which relief can be granted.

FACTS OF THE CASE

The plaintiffs had repeatedly informed DEC that they did not consent to the installation of any meter capable of capturing data other than what is necessary to bill for services rendered. We repeatedly informed the Company that we were refusing the installation of a smart meter for the following reasons:

a) the meter collects personal, private data that is not necessary to determine the amount of electricity used for billing purposes, and b) residents of the home have medical conditions that could be exacerbated by the smart meter.

The plaintiffs repeatedly informed the Company that they in fact have a right to privacy and that the Company did not obtain their consent for the installation of this meter, and proceeded to threaten plaintiffs with disconnect of their power if they did not comply with the Company's demands. Plaintiffs also informed the Company that they were not required to Opt-Out because the Company was engaging in unlawful activity.

ARGUMENT

DEC (the Company) claims that they have not violated any applicable statute or regulation for which the Commission can grant relief, claiming that a hearing in this case is not in the public interest or for the protection of substantial rights. The plaintiffs vehemently disagree and submit the following:

1) DEC in its July 20, 2020, response to our complaint asserts that they have offered plaintiffs an opportunity to "opt out." What they should be offering their customers is an opportunity to opt in...this after fully informing their

customers of the true nature of the meter's capabilities and the uses of the information collected. There is no question that the smart meters collect and store data well beyond what is necessary for billing purposes. This data is the personal, private property of the plaintiffs. The Company has no right or authority to force anyone to allow them to collect that data under threat of disconnection of service for noncompliance. The Company cites "S.C. Code Ann. § 58-3-140(A)" as their regulatory authority. The Company claims that "[i]t is indisputable that the replacement of an analog meter ... is well within the scope of these grants of authority." The plaintiffs dispute that claim. The Commission cannot grant authority that violates our Constitutional protections. The Commission in fact takes an oath of office, S. C. Code of Laws, Title 58, Ch. 3, Sec. 58330, to support and defend our Constitutions, both State and Federal. Any regulations that violate those Constitutions are null and void. All courts – and that includes Administrative Courts – are bound by those Constitutions. The U. S. Supreme Court said:

> Constitutional provisions for the security of person and property are to be liberally construed, and "it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Byars v. U.S.*, 273 U.S. 28, 32 (1927)

The South Carolina Code of Laws, Sec. 16, Ch. 5, entitled *Offences Against Civil Rights*, Sec. 16510, *Conspiracy against civil rights* reads:

> It is unlawful for two or more persons to band or conspire together or go in disguise upon the public highway or upon the premises of

89

another with the intent to injure, oppress, or violate the person or property of a citizen because of his political opinion or his expression or exercise of the same or attempt by any means, measure, or acts to hinder, prevent, or obstruct a citizen in the free exercise and enjoyment of any right or privilege secured to him by the Constitution and laws of the United States or by the Constitution and laws of this State.

2) The Company claims to be "authorized" by the Commission to engage in acts that are unlawful and claims that because they are not a "state actor" that the Company does not need to comply with the constitutions of our state and federal governments. We disagree, and furthermore, this puts the Commission (which is a state actor) in a precarious position. Thus, the Commission either needs to inform the Company that they must comply with Constitutional provisions that protect the privacy and property of their customers, or write regulations that explicitly state the same.

The Company cites Commission regulation 103-320 that provides "meters shall be furnished by the utility." This does not mean that the Company can use any meter – specifically smart meters – that collect and store data which is the personal, private property of the plaintiffs, and which is not necessary for billing purposes, regardless of any "benefits" the Company claims are yielded. The Company is not allowed to violate plaintiffs' rights to their property because it's

"convenient." In order for the placement of smart meters to be lawful, the Company must fully inform their customers of the capabilities of the meters and the uses of the information these meters collect. And, the Company must obtain the informed consent of the customer. Without such informed consent, the Company is committing unlawful acts with the installation of every smart meter. If the Commission sanctions the Company's actions, then the Commission, as a state actor, may be liable for damages caused by the Company.

The issue is not about whether DEC is a state actor. The issue is whether DEC can hide behind regulations/statutes to commit unlawful acts. The issue is also whether the Commission, the Public Service Commission of South Carolina (hereinafter the "PSC") has in fact authorized DEC to commit these unlawful acts. The plaintiffs contend that regulations promulgated by the PSC do not in fact authorize or excuse illegal activity.

The constitutions of both the United States of America and the State of South Carolina protect the privacy of the individual. The company is prohibited from collecting personal, private data without first obtaining informed consent of their customers. The Company is required to obtain a customer's consent to install these devices (smart meters) and they cannot penalize or refuse to provide service to customers who do not consent.

The Company did in fact trespass (a Common Law tort) when they entered the plaintiffs' property and installed the smart meter over the plaintiffs' objections. The Company sites S.C. Code Ann. Regs. 103-344, which provides that "[a]uthorized

agents of the electrical utility shall have the right of access to premises supplied with electric service ... and for any other purpose which is proper and necessary in the conduct of the electrical utility's business." The plaintiffs contend that the purpose was neither proper nor necessary in order to provide electric service.

The plaintiffs' objections to the violation of the right to privacy, which these meters represent, are neither vague nor unspecified. The Company's assertion that the complainants' privacy assertions can only be asserted against state actors is not the issue here. The issue here is that a state agency (the PSC) that regulates the Company (DEC) is in existence to hear complaints of the Company's unlawful activities and to step in and correct the situation.

CONCLUSION

Again, it is the duty – and even the reason for the existence – of the PSC to protect the persons and property of the people of the State of South Carolina from reckless and unlawful activities that may be engaged in by the companies they regulate. As the Company admits on page 6 of their motion to dismiss dated July 8, 2020, "...there is no state law requiring the installation of smart meters". There exists no state law because it would be ruled unconstitutional. Every state and every administrative law court, and every government agency, federal and state down to city and county government is bound by the Federal and State Constitutions. The plaintiffs' complaint and request for a hearing in this case is in fact in the public interest and for the protection of substantial rights. These substantial rights include the Fourth Amendment to the U.S. Constitution which protects the right of the

people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.

The following cases are relevant to the substantial rights involved in this case:

Miranda v. Arizona, 384 U.S. 436, 491:

"Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them."

Gomillion v. Lightfoot, 364 U.S. 155 (1966), cited also in *Smith v. Allwright*, 321 U.S. 644, 649:

"Constitutional 'rights' would be of little value if they could be indirectly denied."

Davis v. Wechsler, 263 US 22, at 24:

"The assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

Hertado v. California, 110 U.S. 516:

"The State cannot diminish rights of the people."

Because the PSC is charged with regulating the activities of DEC, plaintiffs believe and have shown that the Company is engaged in activities that are actionable under the Common Law, as well as Statutory Law. These are substantial rights that the PSC is charged to protect, and it is therefore in the public interest that this complaint be heard.

WHEREFORE, the plaintiffs demand that DEC's Motion to Dismiss be denied and a re- hearing be scheduled as soon as reasonably possible, so that we might present evidence to support our claims, as is our right to due process under the law. We request such other relief as the Commission deems just and proper.

Dated: August 27, 2020

Respectfully submitted,

Randy Gilchrist

Cheryl Gilchrist

Randy and Cheryl Gilchrist
3010 Lake Keowee Lane
Seneca, SC 29672

DUKE ENERGY CAROLINAS, LLC
526 South Church St.
Charlotte, NC 28202
Mailing Address:
EC03T / PO Box 1006
Charlotte, NC 28201-1006

CATHERINE E. HEIGEL
Assistant General Counsel
704.382.8123 OFFICE
704.382.5690 FAX
ceheigel@duke-energy.com

February 26, 2008

Mr. Charles L. A. Terreni
Chief Clerk and Administrator
Public Service Commission of South Carolina
P. O. Drawer 11649
Columbia, South Carolina 29211

RE: Docket Nos. 2005-385-E and 2005-386-E

Dear Mr. Terreni:

Pursuant to Order No. 2007-618 issued by the Public Service Commission of South Carolina (the "Commission") in Docket Nos. 2005-385-E and 2005-386-E, Duke Energy Carolinas, LLC ("Duke Energy Carolinas" or the "Company") hereby submits its response regarding the Company's communications plan to customers on the availability of smart meters and how customers may use metering capabilities to better manage their energy requirements.

Duke Energy Carolinas began offering customers time of use rate options, which included smart metering, in 1981. These options expanded over the years to include a residential off-peak water heating rate, electric vehicle rate, and a form of real-time pricing for larger customers. Duke Energy Carolinas also uses smart metering for its avoided cost rates for Purchased Power. In addition, time of use concepts are reflected in Riders NM and SCG, which the Company previously filed with the Commission for approval in Docket No. 2005-385-E in November 2007. Customers do not incur additional costs for smart meters over and above those covered in the individual rate schedules.

Smart meters are utilized for the following rate schedules, except Schedule WC, which uses a load control device to shift load to off-peak periods. Under these schedules, customers' billing data differentiates between on-peak and off-peak usage and gives price signals that allow customers to alter their energy consumption patterns.

- Residential Schedule WC, Residential Water Heating Service, Controlled/Submetered
- Residential Schedule RT, Residential Service, Time of Use

- Schedule EVX, Electric Vehicle Rate
- Schedule GT, General Service Time of Use (closed to new customers)[1]
- Schedule IT, Industrial Service Time of Use (closed to new customers)
- Schedule OPT, Optional Power Service, Time of Use
- Schedule MP, Multiple Premises
- Schedule PG, Parallel Generation
- Schedule HP-X, Hourly Pricing for Incremental Load

Pursuant to Commission Rule 103-330 b. and c., the Company provides a summary of all available rate schedules, including those using smart metering technology, to each new customer upon service initiation, as well as to existing customers in the form of a bill insert at least once each year. Rate information is also made available on the Company's website. Thus, Duke Energy Carolinas' communication plan is twofold: (1) periodic summaries of available rates schedules are provided to customers at service initiation and then annually thereafter; and (2) continuous information regarding available rate schedules and metering options is contained on the Company's website.

In addition to the rate schedules listed above, the Company's website also provides an on-line home energy audit tool to help customers understand their usage. This tool is currently being enhanced and will soon provide residential customers even greater functionality. The purpose of the on-line home energy audit is to allow customers to perform a customized energy audit of their home. Under the enhanced functionality available in June 2008, customers will be provided a breakdown of their energy consumption into household usage components (*e.g.*, heating, cooling, and water heating) and their total usage will be compared to homes of like kind. This information will be differentiated (*i.e.*, customized) by household. The information answers two fundamental questions for the customer: (1) am I relatively efficient?; and (2) where is my energy being used? The benefit of this tool is that it provides smaller customers with the information necessary to understand their energy usage without requiring the use of a smart meter.

Finally, customers who want even greater detailed energy consumption data may participate in the Company's Remote Meter Reading and Usage Data Service tariff[2], which has been in place since 1995, and has been updated and expanded in a filing of even date for the Commission's review and approval. Under this program, the Company installs a special meter, which records interval load data. The usage data recorded by the meter is then provided to customers for a monthly fee. Upon approval by the Commission, the Company will incorporate a summary of the revised program on its website and in the new customer and annual rate notices described above.

Duke Energy Carolinas is committed to continuing to provide rate, metering, and web-based options that enable customers to better manage their energy usage. The Company believes these options, in conjunction with new and innovative energy efficiency

[1] The Company currently has no customers on this rate schedule.
[2] *See* Docket 1995-1207-E.

programming by Duke Energy Carolinas, are essential to achieving real energy efficiency gains -- both at the individual customer level and the utility system level.

Sincerely,

Catherine E. Heigel

Catherine E. Heigel

Enclosure

cc: Parties of Record

97

Heather Shirley Smith
Deputy General Counsel

Duke Energy
40 W. Broad Street
Suite 690
Greenville, SC 29601

o 864.370.5045
f 864.370.5193
heather.smith@duke-energy.com

October 10, 2016

The Honorable Jocelyn G. Boyd
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, South Carolina 29210

RE: Duke Energy Carolinas, LLC's Request for Approval of AMI Opt-Out Rider
Docket No. 2016-__-E

Dear Mrs. Boyd:

Enclosed for filing for the Commission's consideration is Duke Energy Carolinas, LLC's ("DEC's" or the "Company's") proposed Rider MRM, Manually Read Meter Rider. Based upon the below, the Company respectfully requests that the Commission approve Rider MRM.

DEC is deploying advanced metering infrastructure ("AMI"), which includes deployment of smart meters to its customers in South Carolina. Smart meters give customers more information on how they use energy and provide increased convenience for customers as service connections and disconnections can be performed remotely without the need for a technician to visit their home or business. DEC anticipates the ability to provide customers with increased choices for energy delivery, billing and program offerings such as the Pay As You Go pilot in South Carolina, along with enhanced services that are all enabled by smart meters.

DEC understands some customers may have concerns about smart meters. Although the Company's smart metering hardware complies with all applicable safety and regulatory requirements, in response to these limited customer concerns, DEC proposes to offer an option to the customer where energy usage would not be communicated via radio frequency and the meter would be manually read by a meter reader visiting the premises, provided that such a meter is available for use by the Company. Customers participating in Rider MRM would not be able to participate in any current or future offerings enabled by smart meters. The Company proposes to limit participation under this Rider to all residential customers and non-demand metered nonresidential customers on the Small General Service Schedule SGS.

There are costs to offer Rider MRM, and as proposed, subscribing customers would be required to pay those costs via a set-up fee associated with costs including but not limited to customer enrollment, information technology ("IT") enhancements, installation of a manually-read meter, and assignment to a manual meter reading route. In addition, a subscribing customer would pay a monthly fee to off-set the cost of manually reading the meter. The attached Rider MRM outlines the costs to customers selecting this option.

Up to this point, customers that objected to the installation of a smart meter have been temporarily bypassed during the deployment and continue to be served by meters that are read by computer from a vehicle, sometimes referred to as "drive-by" readings. As more smart meters are deployed, drive-by routes are being discontinued which necessitates the need for a long-term solution for those customers that object to the installation of a smart meter. Upon Commission approval, customers objecting to the installation of a smart meter will be provided with the option to receive service under Rider MRM. In addition, those customers that have been temporarily bypassed during smart meter deployment will be contacted again by DEC and given

the option to have a smart meter installed or request service under Rider MRM. Due to the significant nature of the IT changes required in the customer billing system to effectuate Rider MRM, Rider MRM would be available to customers by November 15, 2017 following Commission approval. The Company needs approval of this option prior to making IT programming changes in order to make the November 15, 2017 time frame. In the interim, Commission approval of Rider MRM will allow the Company to implement those changes with certainty that this option can be provided to customers, and will allow the Company to respond to customers who have requested DEC provide an opt-out option in lieu of installing a smart meter. In other words, if the Commission grants the Company's request, the Company will be able to notify customers and address their concerns with a solution during the interim period as questions arise during AMI deployment.

We believe that approval of Rider MRM does not require a determination of the rate structure and rate of return of the company and will not result in any rate increase. Accordingly, we believe that the provisions of S.C. Code Ann. §58-27-870(F) allow the Commission to approve the proposed changes without notice being given or a hearing being held and we request that the filing be considered without notice or hearing.

Thank you for your attention to this matter. If you have any questions, please let me know.

Sincerely,

Heather Shirley Smith

Heather Shirley Smith

Enclosure

cc: Ms. Nanette Edwards, Esq., Office of Regulatory Staff
Ms. Dawn Hipp, Office of Regulatory Staff
Mr. Jeffery M. Nelson, Esq., Office of Regulatory Staff
Ms. Shannon Bowyer Hudson, Esq., Office of Regulatory Staff
Mr. Michael Seaman-Huynh, Office of Regulatory Staff

RIDER MRM (SC)
MANUALLY READ METER RIDER

AVAILABILITY

Applicable to all residential and small general service customers who request a meter that either does not utilize radio frequency communications to transmit data, or is otherwise required to be read manually, provided that such a meter is available for use by the Company. At the Company's option, meters to be read manually may be either a smart meter with the radio frequency communication capability disabled or other non-communicating meter. The meter manufacturer and model chosen to service the customer's premise are at the discretion of the Company and are subject to change at the Company's option, at any time.

GENERAL PROVISIONS

For residential service, the customer must be served on a standard residential rate schedule.

For nonresidential service, the customer must be served on the Small General Service Schedule SGS without a demand meter, using less than 3,000 kilowatt hours per month and with an estimated demand of less than 15 kW.

This Rider is not available to customers taking service under a net metering rider.

Customers choosing this option will not be eligible for any current or future services or offerings that require the use of a smart or other communicating meter.

The Company may refuse to provide service under this Rider for any of the following conditions.

- If the customer has a history of metering tampering or unauthorized use of electricity at the current or any prior location.
- If such service creates a safety hazard to consumers or their premises, the public or the electric utility's personnel or facilities.
- If the customer does not provide the Company satisfactory access to the Customer's facilities for the purpose of obtaining meter readings or maintaining the Company's equipment.

RATE

Initial Set-Up Fee (one-time)	$ 150.00
Rate per month	$ 11.75

CONTRACT

The original term of this contract is one year. Thereafter, contract may be terminated by either party with thirty days' written notice. The Company reserves the right to terminate the Customer's contract under this Rider at any time upon notice to the Customer for violation of any of the terms or conditions of the applicable schedule or this Rider. If within the first year, the Customer wishes to discontinue service under this Rider, the customer will pay a $50.00 service charge.

Randy and Cheryl Gilchrist

3010 Lake Keowee Lane
Seneca, SC 29672

June 1, 2020 Certified Mail # 7018 0360 0001 8254 0346

Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Please respond to this letter in writing only

Re: Smart Meter

Dear Sir/Madam:

For the past two years (or more) we have been trying to get Duke Energy to replace a digital meter which was installed on our house with an analog/mechanical meter. They have instead pressured us to accept an "upgrade" – a smart meter which we have resisted – and we told them we do not consent. Recently, threatening to cut our power, and over our objections, they installed a smart meter on our house.

As you know, there is no federal security mandate for smart meters. And, as you also may be aware, there are numerous studies that raise serious concerns about the health and environmental hazards associated with these meters. Furthermore, the meters are in fact data collection devices that invade the privacy of the homeowner, collecting data that can be sold and used for purposes other than the provision of electrical services. The South Carolina Constitution protects the state's residents from invasions of privacy which these meters violate.

We did not wish to opt out; we did not see any reason to opt out. The question that Duke Energy should be asking is if their customers want to opt in. In our case we do not want to opt in, and we do not want to be extorted by the company to either accept their terms or have our power disconnected.

There are medical concerns at issue here, and we believe smart meters could aggravate the condition, so it is imperative that these meters be replaced with analog/mechanical meters as soon as possible.

We are entertaining the possibility of litigation in this matter and we are requesting the Public Service Commission to intervene and have Duke Energy replace the meter in question with the analog/mechanical meter and prevent Duke Energy from disconnecting our power while the matter is being litigated.

We have always paid our bill in a timely manner, and there is no issue of non-payment for services rendered in this case. We would appreciate a prompt reply from your office concerning these issues. Duke Energy seems to be of the impression that your agency has authorized them

to force people to accept these "smart" meters. We would like to see any regulations regarding the installation of these meters and we ask to be informed of any relevant regulations regarding smart meters that you have promulgated. Please direct all correspondence in writing to our address above.

Sincerely,

Randy A. Gilchrist
Cheryl Gilchrist

Randy and Cheryl Gilchrist

Cc: Senator Thomas Alexander
Representative Jeff Duncan

106

ROBINSON GRAY
Litigation + Business

SAMUEL J. WELLBORN
DIRECT 803 231.7829 DIRECT FAX 803 231.7878
swellborn@robinsongray.com

July 14, 2020

VIA ELECTRONIC FILING

Mr. David Stark
Hearing Examiner
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Re: Randy and Cheryl Gilchrist v. Duke Energy Carolinas, LLC
Docket No. 2020-147-E

Dear Mr. Stark:

On July 8, 2020, Duke Energy Carolinas, LLC's (the "Company") filed an Answer and Motion to Dismiss the Complaint filed in the above-referenced docket ("Motion"). Included within the Motion was a request that the Commission hold in abeyance the filing deadlines for all parties and the hearing date pending resolution of the Motion. The Company respectfully renews that request. In the event the request is denied, the Company requests that a new procedural schedule be established for this proceeding.

By copy of this letter we are serving the same on the parties of record.

Kind regards,

Sam Wellborn

SJW:tch

cc: Randy and Cheryl Gilchrist (via US Mail)
Alexander W. Knowles, Esquire, ORS (via email & US Mail)
Carri Grube Lybarker, Counsel, Dept of Consumer Affairs (via email & US Mail)
Roger P. Hall, Counsel, Dept of Consumer Affairs (via email & US Mail)
Heather Shirley Smith, Deputy General Counsel (via email)
Katie M. Brown, Counsel (via email)

107

Randy and Cheryl Gilchrist

3010 Lake Keowee Lane
Seneca, SC 29672

July 18, 2020

Mr. David Stark
Hearing Examiner
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Re: Randy and Cheryl Gilchrist v. Duke Energy Carolinas, LLC
Docket No. 2020-147-E

Dear Mr. Stark:

We received the enclosed letter dated July 14, 2020, on July 17, 2020. We respectfully request that Duke Energy Carolinas' Answer and Motion to Dismiss the Complaint in the above-referenced docket be scheduled for a hearing where we can be present. By copy of this letter, we are serving the same on the parties of record.

Sincerely,

Randy and Cheryl Gilchrist

Cc: Duke Energy via Attorneys for Duke Energy Carolinas, LLC via U.S. mail at
Robinson Gray Stepp & Laffitte, LLC, P.O. Box 11449, Columbia, SC 29211
Alexander W. Knowles, Esq., Office of Regulatory Staff of South Carolina, via email
Carri Grube Lybarker, SC Dept. of Consumer Affairs, Counsel, via email
Roger P. Hall, SC Dept. of Consumer Affairs, Counsel, via email

Enc.: Copy of Robinson Gray letter of 7-14-2020

Randy and Cheryl Gilchrist
3010 Lake Keowee Lane
Seneca, SC 29672
(864) 903-2275

October 31, 2020

Honorable Jocelyn C. Boyd, Chief Clerk/Executive Director
Public Service Commission of South Carolina
101 Executive Center Drive
Suite 100
Columbia, SC 29210

Re: Transcripts Docket no. 2020-147-E – Randy and Cheryl Gilchrist, Complainant/Petitioner v. Duke Energy Carolinas, LLC, Defendant/Respondent
Order number 2020-562 August 24, 2020 and Order number 2020-644 October 1, 2020.

Dear Ms. Boyd:

An Order Dismissing Complaint was issued on August 24, 2020, by Comer H, Randell, Acting Chairman, Public Service Commission, and a second order, an Order Denying Petition for Re-hearing was issued on October 1, 2020, by Justin T. Williams, Chairman Public Service Commission. We are requesting transcripts per SC Appellate Court Rules 207(b) for the above-listed docket number case and orders.

We are officially requesting a copy of the complete transcript(s) for these hearings. Please advise us of any balance due, and forward us paper copies at your earliest convenience to our address above.

Sincerely,

Randy and Cheryl Gilchrist

cc: The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Duke Energy via Attorneys for Duke Energy Carolinas, LLC
Robinson Gray Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211

Tonnya K. Kohn, Interim Director
SC Court Administration
Calhoun Building, 1220 Senate St., Ste. 200
Columbia, SC 29201-3739

BEFORE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

COLUMBIA, SOUTH CAROLINA

CM #20-30 **July 29, 2020** **2:00 ~ 2:12 P.M.**

COMMISSION MEMBERS PRESENT: Comer H. 'Randy' RANDALL, *Acting Chairman*; Florence P. BELSER, *Vice Chairman*; and COMMISSIONERS John E. 'Butch' HOWARD[A/V], Thomas J. 'Tom' ERVIN[A/V], and G. O'Neal HAMILTON[A/V]

COMMISSION MEMBERS ABSENT: *Chairman* Justin T. WILLIAMS; Commissioner Swain E. WHITFIELD

ADVISOR TO COMMISSION: F. David Butler
SPECIAL COUNSEL

PRESENTING AGENDA: Josh Minges, Esq.
LEGAL ADVISORY STAFF

STAFF PRESENT: Jocelyn Boyd, Chief Clerk/Administrator; Janice Schmieding[A/V], Clerk's Staff; Randy Erskine, Information Technology Staff; Melissa Purvis, Livestream Technician; and Jo Elizabeth M. Wheat, CVR-CM/M-GNSC, Court Reporter.

TRANSCRIPT / MINUTES

OF

Utilities Agenda Item #2

COMMISSION BUSINESS MEETING

INDEX

In accordance with S.C. Code § 30-4-80(E), the Public Service Commission hereby certifies that it has notified all persons, organizations, local news media, and all other news media requesting notification of the time, date, place, and agenda of this public meeting, by posting a copy of the Notice in its principal office, by e-mailing such Notice to all who request same, and by posting the Notice on the Commission's official Internet website.

[A/V] = via Audio/Videoconference

EXCERPT

MR. MINGES: Mr. Chairman, Item 2, Docket No. 2020-147-E, this matter concerns a motion to dismiss the Complaint of *Randy and Cheryl Gilchrist versus Duke Energy Carolinas*.

COMMISSIONER ERVIN[A/V]: Mr. Chairman.

ACTING CHAIRMAN RANDALL: Commissioner Ervin.

COMMISSIONER ERVIN[A/V]: As stated, we have received a motion to dismiss from Duke Energy Carolinas in this docket. After careful consideration of the filing before the Commission, it appears there is no claim made by the Complainants upon which relief can be granted. I'm going to move that we grant the motion to dismiss.

I would, however, note that the Complainants made some references to potential medical conditions that they may be under a doctor's care for. If that's the case, they may have a remedy under the company's MRM Rider, which is a tariff which a customer may opt out for the manually – in favor of a manually-read meter, provided they meet certain requirements, including the documentation of their medical condition. Since that requirement is not met in the filing that they made, I would encourage them to consult an attorney if they wish to proceed, and consider this as an appropriate option if it applies to their situation.

I move that we grant the motion to dismiss.

[A/V] = via Audio/Videoconference

ACTING CHAIRMAN RANDALL: Thank you.

You've heard Commissioner Ervin's motion. Are there questions or comments?

[No response]

If not, Commissioner Hamilton?

COMMISSIONER HAMILTON[A/V]: Aye.

ACTING CHAIRMAN RANDALL: Commissioner Belser.

VICE CHAIR BELSER: I vote aye.

ACTING CHAIRMAN RANDALL: Commissioner Howard.

COMMISSIONER HOWARD[A/V]: Aye.

ACTING CHAIRMAN RANDALL: Commissioner Ervin.

COMMISSIONER ERVIN[A/V]: Aye.

ACTING CHAIRMAN RANDALL: And I vote aye, and the motion carries. Thank you.

[Excerpt Conclusion]

Date: 11/30/20

Jo Elizabeth M. Wheat, CVR-CM/M-GNSC
Court Reporter ~ Public Service Commission of South Carolina
803.896.5100 ~ Jo.Wheat@psc.sc.gov

[A/V] = via Audio/Videoconference

BEFORE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

COLUMBIA, SOUTH CAROLINA

CM #20-38 **September 16, 2020** **2:00 ~ 2:55 P.M.**

COMMISSION MEMBERS PRESENT: Justin T. WILLIAMS, CHAIRMAN; Florence P. BELSER, VICE CHAIR; *and* COMMISSIONERS John E. 'Butch' HOWARD[A/V], Comer H. 'Randy' RANDALL[A/V], Thomas J. 'Tom' ERVIN[A/V], and Swain E. WHITFIELD[A/V]

COMMISSION MEMBERS ABSENT: Commissioner G. O'Neal HAMILTON

PRESENTING AGENDA: F. David Butler
SPECIAL COUNSEL

STAFF PRESENT: Jocelyn Boyd, Chief Clerk/Administrator; Jo Anne Wessinger Hill, General Counsel; Janice Schmieding[A/V], Clerk's Staff; Randy Erskine, Information Technology Staff; Melissa Purvis, Livestream Technician; and Jo Elizabeth M. Wheat, CVR-CM/M-GNSC, Court Reporter.

TRANSCRIPT / MINUTES

OF

Utilities Agenda Item #9

COMMISSION BUSINESS MEETING

I N D E X

PAGE

In accordance with S.C. Code § 30-4-80(E), the Public Service Commission hereby certifies that it has notified all persons, organizations, local news media, and all other news media requesting notification of the time, date, place, and agenda of this public meeting, by posting a copy of the Notice in its principal office, by e-mailing such Notice to all who request same, and by posting the Notice on the Commission's official Internet website.

[A/V] = via Audio/Videoconference

EXCERPT

CHAIRMAN WILLIAMS: Next item, please.

MR. BUTLER: Yes, sir, that's Item 9, Docket No. 2020-147-E. Staff presents for Commission consideration the Petition for Rehearing filed by Randy and Cheryl Gilchrist in this docket.

CHAIRMAN WILLIAMS: Thank you, Attorney Butler.

Is there a motion?

COMMISSIONER WHITFIELD[A/V]: Mr. Chairman.

CHAIRMAN WILLIAMS: Commissioner Whitfield.

COMMISSIONER ERVIN[A/V]: Mr. Chairman, I move that the Commission dismiss Randy and Cheryl Gilchrist's Petition for Rehearing. The Complainants have not stated a claim upon which relief may be granted by this Commission. Therefore, the claim must be dismissed for the same reasons identified in Commission Order No. 2020-562.

CHAIRMAN WILLIAMS: Thank you, Commissioner Whitfield.

Hearing Commissioner Whitfield's motion, is there any discussion?

VICE CHAIR BELSER: Mr. Chairman.

CHAIRMAN WILLIAMS: Commissioner – excuse me. Vice Chair Belser.

VICE CHAIR BELSER: I think I'm in agreement with the motion, to the extent that it denies the

[A/V] = via Audio/Videoconference

RIDER MRM (SC)
MANUALLY READ METER RIDER

AVAILABILITY (South Carolina Only)
Applicable to all residential and small general service customers who request a meter that either does not utilize radio frequency communications to transmit data, or is otherwise required to be read manually, provided that such a meter is available for use by the Company. At the Company's option, meters to be read manually may be either a smart meter with the radio frequency communication capability disabled or other non-communicating meter. The meter manufacturer and model chosen to service the customer's premise are at the discretion of the Company and are subject to change at the Company's option, at any time.

GENERAL PROVISIONS
For residential service, the customer must be served on a standard residential rate schedule.

For nonresidential service, the customer must be served on the Small General Service Schedule SGS without a demand meter, using less than 3,000 kilowatt hours per month and with an estimated demand of less than 15 kW.

This Rider is not available to customers taking service under a net metering rider.

Customers choosing this option will not be eligible for any current or future services or offerings that require the use of a smart or other communicating meter.

The Company may refuse to provide service under this Rider for any of the following conditions.

- If the customer has a history of metering tampering or unauthorized use of electricity at the current or any prior location.
- If such service creates a safety hazard to consumers or their premises, the public or the electric utility's personnel or facilities.
- If the customer does not provide the Company satisfactory access to the Customer's facilities for the purpose of obtaining meter readings or maintaining the Company's equipment.

Upon Request, the one-time Initial Set-Up Fee may be paid in six equal installments included as a part of the Customer's first six monthly electric service bills following installation of the manually read meter.

The Initial Set-Up Fee and Monthly Rate shall be waived and not apply for customers providing a notarized statement from a medical physician fully licensed by the South Carolina Board of Medical Examiners stating that the customer must avoid exposure to radio frequency emissions, to the extent possible, to protect their health. All such statements shall be retained in Company records on a secure and confidential basis. The Company will provide the customer with a medical release form, to identify general enrollment information, and a physician verification statement. At the physician's option, a comparable physician verification statement may be submitted.

RATE

Initial Set-Up Fee (one-time)	$ 150.00
Rate per month	$ 11.75

CONTRACT
The original term of this contract is one year. Thereafter, contract may be terminated by either party with thirty days' written notice. The Company reserves the right to terminate the Customer's contract under this Rider at any time upon notice to the Customer for violation of any of the terms or conditions of the applicable schedule or this Rider. If within the first year, the Customer wishes to discontinue service under this Rider, the customer will pay a $50.00 service charge.

ENERGY POLICY ACT OF 2005

(b) COMPLIANCE.—

(1) TIME LIMITATIONS.—Section 112(b) of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2622(b)) is amended by adding at the end the following: Deadlines.

"(3)(A) Not later than 2 years after the enactment of this paragraph, each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility shall commence the consideration referred to in section 111, or set a hearing date for such consideration, with respect to each standard established by paragraphs (11) through (13) of section 111(d).

"(B) Not later than 3 years after the date of the enactment of this paragraph, each State regulatory authority (with respect to each electric utility for which it has ratemaking authority), and each nonregulated electric utility, shall complete the consideration, and shall make the determination, referred to in section 111 with respect to each standard established by paragraphs (11) through (13) of section 111(d).".

(2) FAILURE TO COMPLY.—Section 112(c) of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2622(c)) is amended by adding at the end the following: "In the case of each standard established by paragraphs (11) through (13) of section 111(d), the reference contained in this subsection to the date of enactment of this Act shall be deemed to be a reference to the date of enactment of such paragraphs (11) through (13).".

(3) PRIOR STATE ACTIONS.—

(A) IN GENERAL.—Section 112 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2622) is amended by adding at the end the following:

"(d) PRIOR STATE ACTIONS.—Subsections (b) and (c) of this section shall not apply to the standards established by paragraphs (11) through (13) of section 111(d) in the case of any electric utility in a State if, before the enactment of this subsection—

"(1) the State has implemented for such utility the standard concerned (or a comparable standard);

"(2) the State regulatory authority for such State or relevant nonregulated electric utility has conducted a proceeding to consider implementation of the standard concerned (or a comparable standard) for such utility; or

"(3) the State legislature has voted on the implementation of such standard (or a comparable standard) for such utility.".

(B) CROSS REFERENCE.—Section 124 of such Act (16 U.S.C. 2634) is amended by adding the following at the end thereof: "In the case of each standard established by paragraphs (11) through (13) of section 111(d), the reference contained in this subsection to the date of enactment of this Act shall be deemed to be a reference to the date of enactment of such paragraphs (11) through (13).".

SEC. 1252. SMART METERING.

(a) IN GENERAL.—Section 111(d) of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2621(d)) is amended by adding at the end the following:

"(14) TIME-BASED METERING AND COMMUNICATIONS.—(A) Not later than 18 months after the date of enactment of this paragraph, each electric utility shall offer each of its customer Deadline.

classes, and provide individual customers upon customer request, a time-based rate schedule under which the rate charged by the electric utility varies during different time periods and reflects the variance, if any, in the utility's costs of generating and purchasing electricity at the wholesale level. The time-based rate schedule shall enable the electric consumer to manage energy use and cost through advanced metering and communications technology.

"(B) The types of time-based rate schedules that may be offered under the schedule referred to in subparagraph (A) include, among others—

"(i) time-of-use pricing whereby electricity prices are set for a specific time period on an advance or forward basis, typically not changing more often than twice a year, based on the utility's cost of generating and/or purchasing such electricity at the wholesale level for the benefit of the consumer. Prices paid for energy consumed during these periods shall be pre-established and known to consumers in advance of such consumption, allowing them to vary their demand and usage in response to such prices and manage their energy costs by shifting usage to a lower cost period or reducing their consumption overall;

"(ii) critical peak pricing whereby time-of-use prices are in effect except for certain peak days, when prices may reflect the costs of generating and/or purchasing electricity at the wholesale level and when consumers may receive additional discounts for reducing peak period energy consumption;

"(iii) real-time pricing whereby electricity prices are set for a specific time period on an advanced or forward basis, reflecting the utility's cost of generating and/or purchasing electricity at the wholesale level, and may change as often as hourly; and

"(iv) credits for consumers with large loads who enter into pre-established peak load reduction agreements that reduce a utility's planned capacity obligations.

"(C) Each electric utility subject to subparagraph (A) shall provide each customer requesting a time-based rate with a time-based meter capable of enabling the utility and customer to offer and receive such rate, respectively.

"(D) For purposes of implementing this paragraph, any reference contained in this section to the date of enactment of the Public Utility Regulatory Policies Act of 1978 shall be deemed to be a reference to the date of enactment of this paragraph.

"(E) In a State that permits third-party marketers to sell electric energy to retail electric consumers, such consumers shall be entitled to receive the same time-based metering and communications device and service as a retail electric consumer of the electric utility.

Deadline.

"(F) Notwithstanding subsections (b) and (c) of section 112, each State regulatory authority shall, not later than 18 months after the date of enactment of this paragraph conduct an investigation in accordance with section 115(i) and issue a decision whether it is appropriate to implement the standards set out in subparagraphs (A) and (C).".

(b) STATE INVESTIGATION OF DEMAND RESPONSE AND TIME-BASED METERING.—Section 115 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2625) is amended as follows:

(1) By inserting in subsection (b) after the phrase "the standard for time-of-day rates established by section 111(d)(3)" the following: "and the standard for time-based metering and communications established by section 111(d)(14)".

(2) By inserting in subsection (b) after the phrase "are likely to exceed the metering" the following: "and communications".

(3) By adding at the end the following:

"(i) TIME-BASED METERING AND COMMUNICATIONS.—In making a determination with respect to the standard established by section 111(d)(14), the investigation requirement of section 111(d)(14)(F) shall be as follows: Each State regulatory authority shall conduct an investigation and issue a decision whether or not it is appropriate for electric utilities to provide and install time-based meters and communications devices for each of their customers which enable such customers to participate in time-based pricing rate schedules and other demand response programs."

(c) FEDERAL ASSISTANCE ON DEMAND RESPONSE.—Section 132(a) of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2642(a)) is amended by striking "and" at the end of paragraph (3), striking the period at the end of paragraph (4) and inserting ", and", and by adding the following at the end thereof:

"(5) technologies, techniques, and rate-making methods related to advanced metering and communications and the use of these technologies, techniques and methods in demand response programs."

(d) FEDERAL GUIDANCE.—Section 132 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2642) is amended by adding the following at the end thereof:

"(d) DEMAND RESPONSE.—The Secretary shall be responsible for—

"(1) educating consumers on the availability, advantages, and benefits of advanced metering and communications technologies, including the funding of demonstration or pilot projects;

"(2) working with States, utilities, other energy providers and advanced metering and communications experts to identify and address barriers to the adoption of demand response programs; and

"(3) not later than 180 days after the date of enactment of the Energy Policy Act of 2005, providing Congress with a report that identifies and quantifies the national benefits of demand response and makes a recommendation on achieving specific levels of such benefits by January 1, 2007."

Deadline. Reports.

(e) DEMAND RESPONSE AND REGIONAL COORDINATION.—

16 USC 2642 note.

(1) IN GENERAL.—It is the policy of the United States to encourage States to coordinate, on a regional basis, State energy policies to provide reliable and affordable demand response services to the public.

(2) TECHNICAL ASSISTANCE.—The Secretary shall provide technical assistance to States and regional organizations formed by two or more States to assist them in—

(A) identifying the areas with the greatest demand response potential;

(B) identifying and resolving problems in transmission and distribution networks, including through the use of demand response;

(C) developing plans and programs to use demand response to respond to peak demand or emergency needs; and

(D) identifying specific measures consumers can take to participate in these demand response programs.

(3) REPORT.—Not later than 1 year after the date of enactment of the Energy Policy Act of 2005, the Commission shall prepare and publish an annual report, by appropriate region, that assesses demand response resources, including those available from all consumer classes, and which identifies and reviews—

(A) saturation and penetration rate of advanced meters and communications technologies, devices and systems;

(B) existing demand response programs and time-based rate programs;

(C) the annual resource contribution of demand resources;

(D) the potential for demand response as a quantifiable, reliable resource for regional planning purposes;

(E) steps taken to ensure that, in regional transmission planning and operations, demand resources are provided equitable treatment as a quantifiable, reliable resource relative to the resource obligations of any load-serving entity, transmission provider, or transmitting party; and

(F) regulatory barriers to improve customer participation in demand response, peak reduction and critical period pricing programs.

(f) FEDERAL ENCOURAGEMENT OF DEMAND RESPONSE DEVICES.—It is the policy of the United States that time-based pricing and other forms of demand response, whereby electricity customers are provided with electricity price signals and the ability to benefit by responding to them, shall be encouraged, the deployment of such technology and devices that enable electricity customers to participate in such pricing and demand response systems shall be facilitated, and unnecessary barriers to demand response participation in energy, capacity and ancillary service markets shall be eliminated. It is further the policy of the United States that the benefits of such demand response that accrue to those not deploying such technology and devices, but who are part of the same regional electricity entity, shall be recognized.

Deadlines.

(g) TIME LIMITATIONS.—Section 112(b) of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2622(b)) is amended by adding at the end the following:

"(4)(A) Not later than 1 year after the enactment of this paragraph, each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility shall commence the consideration referred to in section 111, or set a hearing date for such consideration, with respect to the standard established by paragraph (14) of section 111(d).

"(B) Not later than 2 years after the date of the enactment of this paragraph, each State regulatory authority (with respect to each electric utility for which it has ratemaking authority),

and each nonregulated electric utility, shall complete the consideration, and shall make the determination, referred to in section 111 with respect to the standard established by paragraph (14) of section 111(d).".

(h) FAILURE TO COMPLY.—Section 112(c) of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2622(c)) is amended by adding at the end the following:

"In the case of the standard established by paragraph (14) of section 111(d), the reference contained in this subsection to the date of enactment of this Act shall be deemed to be a reference to the date of enactment of such paragraph (14).".

(i) PRIOR STATE ACTIONS REGARDING SMART METERING STANDARDS.—

(1) IN GENERAL.—Section 112 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2622) is amended by adding at the end the following:

"(e) PRIOR STATE ACTIONS.—Subsections (b) and (c) of this section shall not apply to the standard established by paragraph (14) of section 111(d) in the case of any electric utility in a State if, before the enactment of this subsection—

"(1) the State has implemented for such utility the standard concerned (or a comparable standard);

"(2) the State regulatory authority for such State or relevant nonregulated electric utility has conducted a proceeding to consider implementation of the standard concerned (or a comparable standard) for such utility within the previous 3 years; or

"(3) the State legislature has voted on the implementation of such standard (or a comparable standard) for such utility within the previous 3 years.".

(2) CROSS REFERENCE.—Section 124 of such Act (16 U.S.C. 2634) is amended by adding the following at the end thereof: "In the case of the standard established by paragraph (14) of section 111(d), the reference contained in this subsection to the date of enactment of this Act shall be deemed to be a reference to the date of enactment of such paragraph (14).".

SEC. 1253. COGENERATION AND SMALL POWER PRODUCTION PURCHASE AND SALE REQUIREMENTS.

(a) TERMINATION OF MANDATORY PURCHASE AND SALE REQUIREMENTS.—Section 210 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 824a-3) is amended by adding at the end the following:

"(m) TERMINATION OF MANDATORY PURCHASE AND SALE REQUIREMENTS.—

"(1) OBLIGATION TO PURCHASE.—After the date of enactment of this subsection, no electric utility shall be required to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that the qualifying cogeneration facility or qualifying small power production facility has nondiscriminatory access to—

"(A)(i) independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy; or

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CARPENTER *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 16–402. Argued November 29, 2017—Decided June 22, 2018

Cell phones perform their wide and growing variety of functions by continuously connecting to a set of radio antennas called "cell sites." Each time a phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). Wireless carriers collect and store this information for their own business purposes. Here, after the FBI identified the cell phone numbers of several robbery suspects, prosecutors were granted court orders to obtain the suspects' cell phone records under the Stored Communications Act. Wireless carriers produced CSLI for petitioner Timothy Carpenter's phone, and the Government was able to obtain 12,898 location points cataloging Carpenter's movements over 127 days—an average of 101 data points per day. Carpenter moved to suppress the data, arguing that the Government's seizure of the records without obtaining a warrant supported by probable cause violated the Fourth Amendment. The District Court denied the motion, and prosecutors used the records at trial to show that Carpenter's phone was near four of the robbery locations at the time those robberies occurred. Carpenter was convicted. The Sixth Circuit affirmed, holding that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers.

Held:

1. The Government's acquisition of Carpenter's cell-site records was a Fourth Amendment search. Pp. 4–18.

(a) The Fourth Amendment protects not only property interests but certain expectations of privacy as well. *Katz* v. *United States*, 389 U. S. 347, 351. Thus, when an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is

prepared to recognize as reasonable," official intrusion into that sphere generally qualifies as a search and requires a warrant supported by probable cause. *Smith* v. *Maryland*, 442 U. S. 735, 740 (internal quotation marks and alterations omitted). The analysis regarding which expectations of privacy are entitled to protection is informed by historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." *Carroll* v. *United States*, 267 U. S. 132, 149. These Founding-era understandings continue to inform this Court when applying the Fourth Amendment to innovations in surveillance tools. See, *e.g.*, *Kyllo* v. *United States*, 533 U. S. 27. Pp. 4–7.

(b) The digital data at issue—personal location information maintained by a third party—does not fit neatly under existing precedents but lies at the intersection of two lines of cases. One set addresses a person's expectation of privacy in his physical location and movements. See, *e.g.*, *United States* v. *Jones*, 565 U. S. 400 (five Justices concluding that privacy concerns would be raised by GPS tracking). The other addresses a person's expectation of privacy in information voluntarily turned over to third parties. See *United States* v. *Miller*, 425 U. S. 435 (no expectation of privacy in financial records held by a bank), and *Smith*, 442 U. S. 735 (no expectation of privacy in records of dialed telephone numbers conveyed to telephone company). Pp. 7–10.

(c) Tracking a person's past movements through CSLI partakes of many of the qualities of GPS monitoring considered in *Jones*—it is detailed, encyclopedic, and effortlessly compiled. At the same time, however, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of *Smith* and *Miller*. Given the unique nature of cell-site records, this Court declines to extend *Smith* and *Miller* to cover them. Pp. 10–18.

(1) A majority of the Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. Allowing government access to cell-site records—which "hold for many Americans the 'privacies of life,'" *Riley* v. *California*, 573 U. S. ___, ___—contravenes that expectation. In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring considered in *Jones*: They give the Government near perfect surveillance and allow it to travel back in time to retrace a person's whereabouts, subject only to the five-year retention policies of most wireless carriers. The Government contends that CSLI data is less precise than GPS information, but it thought the data accurate enough here to highlight it during closing argument in Carpenter's trial. At any rate, the rule the Court adopts "must take account of more sophisticated systems that are already in use or in

development." *Kyllo*, 533 U. S., at 36, and the accuracy of CSLI is rapidly approaching GPS-level precision. Pp. 12–15.

(2) The Government contends that the third-party doctrine governs this case, because cell-site records, like the records in *Smith* and *Miller*, are "business records," created and maintained by wireless carriers. But there is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers.

The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. *Smith* and *Miller*, however, did not rely solely on the act of sharing. They also considered "the nature of the particular documents sought" and limitations on any "legitimate 'expectation of privacy' concerning their contents." *Miller*, 425 U. S., at 442. In mechanically applying the third-party doctrine to this case the Government fails to appreciate the lack of comparable limitations on the revealing nature of CSLI.

Nor does the second rationale for the third-party doctrine—voluntary exposure—hold up when it comes to CSLI. Cell phone location information is not truly "shared" as the term is normally understood. First, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. *Riley*, 573 U. S., at ___. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the user's part beyond powering up. Pp. 15–17.

(d) This decision is narrow. It does not express a view on matters not before the Court; does not disturb the application of *Smith* and *Miller*, or call into question conventional surveillance techniques and tools, such as security cameras; does not address other business records that might incidentally reveal location information; and does not consider other collection techniques involving foreign affairs or national security. Pp. 17–18.

2. The Government did not obtain a warrant supported by probable cause before acquiring Carpenter's cell-site records. It acquired those records pursuant to a court order under the Stored Communications Act, which required the Government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." 18 U. S. C. §2703(d). That showing falls well short of the probable cause required for a warrant. Consequently, an order issued under §2703(d) is not a permissible mechanism for accessing historical cell-site records. Not all orders compelling the production of documents will require a showing of probable cause. A

Syllabus

warrant is required only in the rare case where the suspect has a legitimate privacy interest in records held by a third party. And even though the Government will generally need a warrant to access CSLI, case-specific exceptions—*e.g.*, exigent circumstances—may support a warrantless search. Pp. 18–22.

819 F. 3d 880, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined. GORSUCH, J., filed a dissenting opinion.

In the

United States Court of Appeals

For the Seventh Circuit

No. 16-3766

NAPERVILLE SMART METER AWARENESS,

Plaintiff-Appellant,

v.

CITY OF NAPERVILLE,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 11 C 9299 — John Z. Lee, *Judge.*

ARGUED MARCH 27, 2018 — DECIDED AUGUST 16, 2018

Before WOOD, *Chief Judge*, and BAUER and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge*. The City of Naperville owns and operates a public utility that provides electricity to the city's residents. The utility collects residents' energy-consumption data at fifteen-minute intervals. It then stores the data for up to three years. This case presents the question whether Naperville's collection of this data is reasonable under the Fourth

Amendment of the U.S. Constitution and Article I, § 6 of the Illinois Constitution.

I. BACKGROUND

The American Recovery and Reinvestment Act of 2009 set aside funds to modernize the Nation's electrical grid. The Act tasked the Department of Energy with distributing these funds under the Smart Grid Investment Grant program. Through this program, the City of Naperville was selected to receive $11 million to update its own grid. As part of these upgrades, Naperville began replacing its residential, analog energy meters with digital "smart meters."

Using traditional energy meters, utilities typically collect monthly energy consumption in a single lump figure once per month. By contrast, smart meters record consumption much more frequently, often collecting thousands of readings every month. Due to this frequency, smart meters show both the amount of electricity being used inside a home and when that energy is used.

This data reveals information about the happenings inside a home. That is because individual appliances have distinct energy-consumption patterns or "load signatures." Ramyar Rashed Mohassel et al., *A Survey on Advanced Metering Infrastructure*, 63 Int'l J. Electrical Power & Energy Systems 473, 478 (2014). A refrigerator, for instance, draws power differently than a television, respirator, or indoor grow light. By comparing longitudinal energy-consumption data against a growing library of appliance load signatures, researchers can predict the appliances that are present in a home and when those appliances are used. *See id.*; A. Prudenzi, *A Neuron Nets Based Procedure for Identifying Domestic Appliances Pattern-of-*

Use from Energy Recordings at Meter Panel, 2 IEEE Power Engineering Soc'y Winter Meeting 941 (2002). The accuracy of these predictions depends, of course, on the frequency at which the data is collected and the sophistication of the tools used to analyze that data.

While some cities have allowed residents to decide whether to adopt smart meters, Naperville's residents have little choice. If they want electricity in their homes, they must buy it from the city's public utility. And they cannot opt out of the smart-meter program.[1] The meters the city installed collect residents' energy-usage data at fifteen-minute intervals. Naperville then stores the data for up to three years.

Naperville Smart Meter Awareness ("Smart Meter Awareness"), a group of concerned citizens, sued Naperville over the smart-meter program. It alleges that Naperville's smart meters reveal "intimate personal details of the City's electric customers such as when people are home and when the home is vacant, sleeping routines, eating routines, specific appliance types in the home and when used, and charging data for plug-in vehicles that can be used to identify travel routines and history." (R. 102-1 at 14.) The organization further alleges that collection of this data constitutes an unreasonable search under the Fourth Amendment of the U.S. Constitution as well

[1] Residents may request that Naperville replace their analog meters with "non-wireless" smart meters. But these alternatives are smart meters with wireless transmission disabled. They collect equally rich data. The difference is that the data must be manually retrieved. (R. 117 at 3.)

as an unreasonable search and invasion of privacy under Article I, § 6 of the Illinois Constitution.[2]

The district court dismissed two of Smart Meter Awareness's complaints without prejudice. Smart Meter Awareness requested leave to file a third, but the district court denied that request. It reasoned that amending the complaint would be futile because even the proposed third amended complaint had not plausibly alleged a Fourth Amendment violation or a violation of the Illinois Constitution. Smart Meter Awareness appealed. Because the district court denied leave to amend on futility grounds, we apply the legal sufficiency standard of Rule 12(b)(6) *de novo* to determine if the proposed amended complaint fails to state a claim. *See, e.g., Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1085 (7th Cir. 1997).

II. ANALYSIS

The Fourth Amendment of the U.S. Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Similarly, Article I, § 6 of the Illinois Constitution affords people "the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means."

We can resolve both the state and federal constitutional claims by answering the following two questions.[3] First, has

---

[2] Smart Meter Awareness challenged the smart-meter program on a number of other grounds that are not relevant to this appeal.

[3] The Illinois Supreme Court applies "a 'limited lockstep' approach when interpreting cognate provisions of [the Illinois] and federal constitutions." *See, e.g., City of Chicago v. Alexander*, 89 N.E.3d 707, 713 (Ill. 2017)

the organization plausibly alleged that the data collection is a search? Second, is the search unreasonable? For the reasons that follow, we find that the data collection constitutes a search under both the Fourth Amendment and the Illinois Constitution. This search, however, is reasonable. [4]

A. The collection of smart-meter data at fifteen-minute intervals constitutes a search.

"At the [Fourth Amendment's] very core stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). This protection, though previously tied to common-law trespass, now encompasses

---

(citing *People v. Caballes*, 851 N.E.2d 26, 35–36 (Ill. 2006)). Under this approach, the Illinois Supreme Court will interpret a provision of the Illinois Constitution in the same way as a similar provision in the Federal Constitution absent certain exceptional circumstances. *See Caballes*, 851 N.E.2d at 31–46 (tracing the development and application of the limited lockstep approach). Here, our analysis focuses on two terms: "searches" and "unreasonable." These terms appear in both documents in analogous fashion. Neither party has "made a case for an exception to the lockstep doctrine." *Id.* at 46. And we see no reason for an exception. Thus, our analysis of Smart Meter Awareness's claim under the Fourth Amendment also resolves its claim under Article I, § 6 of Illinois Constitution.

[4] Smart Meter Awareness also claims that smart meters are an invasion of privacy under Article I, § 6 of the Illinois Constitution. It's certainly possible that this is the case. But the Illinois Supreme Court conducts reasonableness balancing for the invasion of privacy under the same framework as searches under the Fourth Amendment. *In re May 1991 Will Cty. Grand Jury*, 604 N.E.2d 929, 934–35 (Ill. 1992). Even were we to find that the data collection was an invasion of privacy as well as a search, our reasonableness analysis for both claims would be the same. We therefore decline to conduct the additional analysis.

searches of the home made possible by ever-more sophisticated technology. *Kyllo v. United States*, 533 U.S. 27, 31–32 (2001). Any other rule would "erode the privacy guaranteed by the Fourth Amendment." *Id.* at 34.

"Where ... the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search.'" *Id.* at 40. This protection remains in force even when the enhancements do not allow the government to literally peer into the home. In *Kyllo*, for instance, the intrusion by way of thermal imaging was relatively crude—it showed that "the roof over the garage and a side wall of [a] home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex." *Id.* at 30. The device "did not show any people or activity within the walls of the structure" nor could it "penetrate walls or windows to reveal conversations or human activities." *Id* (quoting Supp. App. to Pet. for Cert. 39–40). Nevertheless, the Supreme Court held that law enforcement had searched the home when they collected thermal images. *Id.* at 40.

The technology-assisted data collection that Smart Meter Awareness alleges here is at least as rich as that found to be a search in *Kyllo*. Indeed, the group alleges that energy-consumption data collected at fifteen-minute intervals reveals when people are home, when people are away, when people sleep and eat, what types of appliances are in the home, and when those appliances are used.[5] (R. 102-1 at 14.) By contrast,

[5] Smart Meter Awareness directed the court to academic studies demonstrating the revealing nature of smart-meter data collected at fifteen-minute intervals, *see, e.g.*, Ramyar Rashed Mohassel et al., *supra* at

Kyllo merely revealed that something in the home was emitting a large amount of energy (in the form of heat).

It's true that observers of smart-meter data must make some inferences to conclude, for instance, that an occupant is showering, or eating, or sleeping. But *Kyllo* rejected the "extraordinary assertion that anything learned through 'an inference' cannot be a search." *Id.* at 36 (quoting *id.* at 44 (Stevens, J., dissenting)). What's more, the data collected by Naperville can be used to draw the exact inference that troubled the Court in *Kyllo*. There, law enforcement "concluded that [a home's occupant] was using halide lights to grow marijuana in his house" based on an excessive amount of energy coming from the home. *Id.* at 30. Here too, law enforcement could conclude that an occupant was using grow lights from incredibly high meter readings, particularly if the power was drawn at odd hours. In fact, the data collected by Naperville could prove even more intrusive. By analyzing the energy consumption of a home over time in concert with appliance load profiles for grow lights, Naperville law enforcement could "conclude" that a resident was using the lights with more confidence than those using thermal imaging could ever hope for. With little effort, they could conduct this analysis for many homes over many years.

Under *Kyllo*, however, even an extremely invasive technology can evade the warrant requirement if it is "in general public use." *Id.* at 40. While more and more energy providers are encouraging (or in this case forcing) their customers to

478; A. Prudenzi, *supra*, and to commercially available products that can identify what appliances are used in a home and when they are used based on smart-meter data. *See Disaggregation*, Ecotagious, https://www.ecotagious.com/disaggregation/ (last visited July 25, 2018).

permit the installation of smart meters, the meters are not yet so pervasive that they fall into this class. To be sure, the exact contours of this qualifier are unclear—since *Kyllo*, the Supreme Court has offered little guidance. But *Kyllo* itself suggests that the use of technology is not a search when the technology is both widely available and routinely used by the general public. *See id.* at 39 n.6 (quoting *California v. Ciraolo*, 476 U.S. 207, 215 (1986) ("In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet.")). Smart meters, by contrast, have been adopted only by a portion of a highly specialized industry.

The ever-accelerating pace of technological development carries serious privacy implications. Smart meters are no exception. Their data, even when collected at fifteen-minute intervals, reveals details about the home that would be otherwise unavailable to government officials with a physical search. Naperville therefore "searches" its residents' homes when it collects this data.

Before continuing, we address one wrinkle to the search analysis. Naperville argues that the third-party doctrine renders the Fourth Amendment's protections irrelevant here. Under that doctrine, a person surrenders her expectation of privacy in information by voluntarily sharing it with a third party. *See Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2018) (citing *Smith v. Maryland*, 442 U.S. 735, 743–744 (1979) and *United States v. Miller*, 425 U.S. 435, 443 (1976)). Thus, when a government authority gathers the information from the third

party, it does not run afoul of the Fourth Amendment. *Id.* Referencing this doctrine, Naperville argues that its citizens sacrifice their expectation of privacy in smart-meter data by entering into a "voluntary relationship" to purchase electricity from the city.

This argument is unpersuasive. As a threshold matter, Smart Meter Awareness challenges the collection of the data by Naperville's public utility. There is no third party involved in the exchange.[6] Moreover, were we to assume that Naperville's public utility was a third party, the doctrine would still provide Naperville no refuge. The third-party doctrine rests on "the notion that an individual has a reduced expectation of privacy in information knowingly shared with another." *Carpenter*, 138 S. Ct. at 2219. But in this context, a choice to share data imposed by fiat is no choice at all. If a person does not—in any meaningful sense—"voluntarily 'assume the risk' of turning over a comprehensive dossier of physical movements" by choosing to use a cell phone, *Carpenter*, 138 S. Ct. at 2220 (quoting *Smith*, 442 U.S. at 745), it also goes that a home occupant does not assume the risk of near constant monitoring by choosing to have electricity in her home. We therefore doubt that *Smith* and *Miller* extend this far.

[6] This alone renders Naperville's reference to the Eighth Circuit's decision, *United States v. McIntyre*, 646 F.3d 1107 (8th Cir. 2011), irrelevant. Whereas here residents contest the utility's initial collection of the data, McIntrye challenged law enforcement's subsequent warrantless collection of traditional meter readings from the utility.

B. The data collection is a reasonable search.

That the data collection constitutes a search does not end our inquiry. Indeed, "[t]he touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). Thus, if Naperville's search is reasonable, it may collect the data without a warrant. Since these searches are not performed as part of a criminal investigation, *see Riley v. California*, 134 S. Ct. 2473, 2482 (2014), we can turn immediately to an assessment of whether they are reasonable, "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 187–88 (2004) (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)). Although in this case, our balancing begins with the presumption that this warrantless search is unreasonable, *see Kyllo*, 533 U.S. at 40, Naperville's smart-meter ordinance overcomes this presumption.

Residents certainly have a privacy interest in their energy-consumption data. But its collection—even if routine and frequent—is far less invasive than the prototypical Fourth Amendment search of a home. Critically, Naperville conducts the search with no prosecutorial intent. Employees of the city's public utility—not law enforcement—collect and review the data.

In *Camara v. Municipal Court*, the Supreme Court noted that this consideration lessens an individual's privacy interest. 387 U.S. 523, 530 (1967). And though the Court held that a warrantless, administrative, home inspection violated the Fourth Amendment in that case, it did so based on concerns largely absent from this one. *Id.* at 530–31. Indeed, unlike the search in *Camara*, Naperville's data collection reveals details

about the home without physical entry. *See id.* at 531 (highlighting the "serious threat to personal and family security" posed by physical entry). Moreover, the risk of corollary prosecution that troubled the court in *Camara* is minimal here. *See id.* (noting that "most regulatory laws, fire, health, and housing codes are enforced by criminal process."). To this court's knowledge, using too much electricity is not yet a crime in Naperville. And Naperville's amended "Smart Grid Customer Bill of Rights" clarifies that the city's public utility will not provide customer data to third parties, including law enforcement, without a warrant or court order. Thus, the privacy interest at stake here is yet more limited than that at issue in *Camara*.

Of course, even a lessened privacy interest must be weighed against the government's interest in the data collection. That interest is substantial in this case. Indeed, the modernization of the electrical grid is a priority for both Naperville, (R. 120-1, Smart Meter Agreement between Naperville and the Department of Energy), and the Federal Government, *see Smart Grid*, Federal Energy Regulatory Commission (Apr. 21, 2016), https://www.ferc.gov/industries/electric/indus-act/smart-grid.asp.

Smart meters play a crucial role in this transition. *See id.* For instance, they allow utilities to restore service more quickly when power goes out precisely because they provide energy-consumption data at regular intervals. *See, e.g.*, Noelia Uribe-Pérez et al., *State of the Art and Trends Review of* Smart Metering *in Electricity Grids*, 6 Applied Sci., no. 3, 2016, at 68, 82. The meters also permit utilities to offer time-based pricing, an innovation which reduces strain on the grid by encourag-

ing consumers to shift usage away from peak demand periods. *Id.* In addition, smart meters reduce utilities' labor costs because home visits are needed less frequently. *Id.*

With these benefits stacked together, the government's interest in smart meters is significant. Smart meters allow utilities to reduce costs, provide cheaper power to consumers, encourage energy efficiency, and increase grid stability. We hold that these interests render the city's search reasonable, where the search is unrelated to law enforcement, is minimally invasive, and presents little risk of corollary criminal consequences.

We caution, however, that our holding depends on the particular circumstances of this case. Were a city to collect the data at shorter intervals, our conclusion could change. Likewise, our conclusion might change if the data was more easily accessible to law enforcement or other city officials outside the utility.

III. Conclusion

Naperville could have avoided this controversy—and may still avoid future uncertainty—by giving its residents a genuine opportunity to consent to the installation of smart meters, as many other utilities have. Nonetheless, Naperville's warrantless collection of its residents' energy-consumption data survives our review in this case.

Even when set to collect readings at fifteen-minute intervals, smart meters provide Naperville rich data. Accepting Smart Meter Awareness's well-pled allegations as true, this collection constitutes a search. But because of the significant

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Case No. 2020-001445

Randy and Cheryl Gilchrist

Appellants

v.

Duke Energy Carolinas, LLC

Respondent

CERTIFICATION OF RECORD ON APPEAL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

June 14, 2021

Randy and Cheryl Gilchrist

Randy and Cheryl Gilchrist
3010 Lake Keowee Lane
Seneca, SC 29672
Phone: 864.903.0375
Pro Per/Appellants

Parties of Record:

Honorable Jocelyn C. Boyd, Chief Clerk/Executive Director
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

government interests in the program, and the diminished privacy interests at stake, the search is reasonable. We therefore AFFIRM the district court's denial of leave to amend.

Attorneys for Respondent, Duke Energy Carolinas, LLC:

Samuel J. Wellborn, Esq.
Robinson Gray Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211
Phone: 803.231.7829